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ABSTRACT

This hearing was held to discuss a proposal to restore a measure of equity and fairness to the copyright law. Under current law, authors whose works were created after January 1, 1978, receive a single term of copyright protection, extending for the life of the author, plus 50 years. But authors of pre-1978 works are only entitled to a 28-year term of protection, and must file a registration renewal with the copyright office to receive an additional 47-year term of protection. This renewal requirement has caused a number of authors to accidentally forfeit copyright protection for their work, consequences felt most harshly by less noted authors of minor works, and by heirs and families of authors. S. 756, a bill to amend the copyright renewal provisions of title 17, U.S. Code, will automatically grant an additional 47-year term of copyright protection for these pre-1978 works and will make registration renewal voluntary. After an opening statement by Dennis DeConcini, Chairman of the Subcommittee, and the text of S. 756, transcripts of the testimony and/or statements by two witnesses are provided: (1) Ralph Oman, Register of Copyrights at the Library of Congress, accompanied by Dorothy Schrader and Eric Schwartz; and (2) Burton Lane, composer, on behalf of the American Society of Composers, Authors, and Publishers, accompanied by Bernard Korman. Also included are additional statements and letters submitted for the record by Broadcast Music, Inc.; Jacqueline Byrd (widow of songwriter Robert Byrd); Irwin Karp (Committee for Literary Property Studies); John M. Kernochan (Columbia University School of Law); Gregory Luce (Sinister Cinema Video); National Music Publishers' Association, Inc.; L. Ray Patterson, Professor of Law, University of Georgia); and Barbara Ringer (former Register of Copyrights). (DB)

S. Hrg. 102-348

COPYRIGHT RENEWAL PROVISIONS

HEARING

BEFORE THE

SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED SECOND CONGRESS

FIRST SESSION

ON

S. 756

A BILL TO AMEND TITLE 17, UNITED STATES CODE, THE COPYRIGHT RENEWAL PROVISIONS, AND FOR OTHER PURPOSES

JUNE 12, 1991

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COPYRIGHT RENEWAL PROVISIONS

WEDNESDAY, JUNE 12, 1991

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS,
Washington, DC.

The subcommittee met, pursuant to recess, at 3:20 p.m., in room 226, Dirksen Senate Office Building, Hon. Dennis Deconcini (chairman of the subcommittee) presiding.

Also present: Senators Hatch and Grassley.

OPENING STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator DECONCINI. The committee will please come to order. Those who care to converse will please step outside. Our witnesses, Mr. Lane and Mr. Oman, can come forward. Please take your seats, and anybody you want to be with you.

We will now examine a proposal to restore a measure of equity and fairness to the copyright law. S. 756 will amend the registration renewal provision, a complicated and highly technical requirement of the copyright law.

Under current law, authors whose works are created after January 1, 1978, receive a single term of copyright protection, extending for the life of the author, plus 50 years. But, authors of pre-1978 work are only entitled to a 28-year term of protection, and must file a registration renewal with the copyright office to receive an additional 47-year term of protection for their work. S. 756 will automatically grant an additional, 47-year term of copyright protection for these pre-1978 works and make registration renewal voluntarily.

The present renewal requirement has caused an untold number of authors to accidentally forfeit copyright protection for their work. The consequences are felt most harshly by less noted authors of minor works. These works often supply a valuable source, sometimes the sole source, of income for authors and their families. Unfortunately, through inadvertence or neglect, authors, their families or agents fail to file timely renewal registrations and the works fall irretrievably into the public domain. That is why this legislation has been described by many in the copyright community as "a widows and orphans" bill.

Critics may argue that this bill will limit the public's access to creative works; that it will diminish the public domain. But the public domain should not be enlarged because of an author's error

in recordkeeping or any other innocent failure to comply with overly technical requirements of the copyright law.

All of the works that are affected by this bill, in some way, enrich our culture. Their creators do not want to withhold them from the public. They simply want to retain rights enjoyed by authors of more recent works and enjoy the full benefits of their investment of time and creative skills.

This bill is supported by writers, filmmakers, publishers, and most other members of the American creative community.

Our witnesses today are Mr. Ralph Oman, the Register of Copyrights, and Mr. Burton Lane, a songwriter who is appearing on behalf of the American Society of Composers, Authors, and Publishers. We attempted to find some opponents to this bill to testify today. We sent up every signal and we couldn't find any. So maybe one of you want to tell us why nobody is against this bill, as well as why we should be for it.

Mr. Oman, welcome.

[The prepared statement of Senator DeConcini and a copy of S. 756 follow:]

STATEMENT OF SENATOR DECONCINI ON S. 756
HEARING OF JUNE 12, 1991
BEFORE THE SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

WE WILL NOW EXAMINE A PROPOSAL TO RESTORE A MEASURE OF EQUITY AND FAIRNESS TO THE COPYRIGHT LAW. S. 756, WHICH SENATOR HATCH AND I INTRODUCED ON MARCH 21, AND WHICH SENATOR LEAHY HAS COSPONSORED, WILL AMEND THE COPYRIGHT REGISTRATION RENEWAL PROVISION.

THIS BILL WILL MODIFY A COMPLICATED AND HIGHLY TECHNICAL REQUIREMENT OF THE COPYRIGHT LAW. THE PRESENT REQUIREMENT HAS CAUSED AN UNTOLD NUMBER OF WRITERS, FILMMAKERS, SONGWRITERS, POETS AND OTHER ARTISTS TO ACCIDENTALLY FORFEIT COPYRIGHT PROTECTION FOR THEIR WORK.

UNDER CURRENT LAW, AUTHORS WHOSE WORKS ARE CREATED AFTER JANUARY 1, 1978, RECEIVE A SINGLE TERM OF COPYRIGHT PROTECTION EXTENDING FOR THE LIFE OF THE AUTHOR PLUS 50 YEARS. IN CONTRAST, AUTHORS OF PRE-1978 WORKS ARE ONLY ENTITLED TO A 28 YEAR TERM OF PROTECTION, AND MUST FILE A REGISTRATION RENEWAL WITH THE COPYRIGHT OFFICE TO RECEIVE AN ADDITIONAL, 47 YEAR TERM OF PROTECTION FOR THEIR WORK. S. 756 WILL ELIMINATE THIS DISTINCTION BY AUTOMATICALLY GRANTING AN ADDITIONAL, 47 YEAR TERM OF COPYRIGHT PROTECTION FOR WORKS CREATED BEFORE JANUARY 1, 1978, AND MAKE REGISTRATION RENEWAL VOLUNTARY.

AMONG THE WORKS THAT HAVE LOST PROTECTION BECAUSE OF THE RENEWAL REQUIREMENT HAVE BEEN SOME AMERICAN CLASSICS. JAMES STEWART GRACES THE TELEVISION SCREENS OF MILLIONS OF AMERICAN HOMES EVERY CHRISTMAS SEASON IN IT'S A WONDERFUL LIFE. BUT AN ERROR IN COMPLYING WITH THE COPYRIGHT RENEWAL REQUIREMENT CAUSED FRANK CAPRA, THE MAKER OF THAT BELOVED MOVIE, TO LOSE ALL RIGHTS TO IT. THE FILES OF THE COPYRIGHT OFFICE ARE FILLED WITH OTHER TITLES THAT HAVE ALSO LOST PROTECTION IN THE PAST BECAUSE OF THE REQUIREMENT: SHORT STORIES BY EARNEST HEMINGWAY AND F. SCOTT FITZGERALD, PLAYS BY EUGENE O'NEILL, AND OTHER IMPORTANT WORKS.

TODAY, HOWEVER, THE EFFECTS OF THE CURRENT COPYRIGHT RENEWAL PROVISION ARE FELT MOST HARSHLY BY LESS NOTED AUTHORS OF MINOR WORKS. THESE WORKS OFTEN SUPPLY A VALUABLE SOURCE, SOMETIMES THE SOLE SOURCE OF INCOME FOR AUTHORS AND THEIR FAMILIES. UNFORTUNATELY, THROUGH INADVERTENCE OR NEGLECT, AUTHORS, THEIR FAMILIES OR AGENTS FAIL TO FILE TIMELY RENEWAL REGISTRATIONS, AND THE WORKS FALL IRRETRIEVABLY INTO THE PUBLIC DOMAIN.

THAT IS WHY THIS LEGISLATION HAS BEEN DESCRIBED BY MANY IN THE COPYRIGHT COMMUNITY AS A "WIDOWS AND ORPHANS" BILL. IT WILL BENEFIT THOSE AUTHORS AND THEIR FAMILIES WHO LACK THE SOPHISTICATED RESOURCES -- THE SERVICES OF LAWYERS, AGENTS AND

PUBLISHING HOUSES -- THAT MORE NOTED CREATIVE TALENTS CAN HIRE TO HELP THEM NAVIGATE THE INTRICATE REQUIREMENTS OF THE LAW. DURING THE DEBATE ON GENERAL REVISION OF THE LAW IN 1976, CONGRESS RECOGNIZED THAT THE RENEWAL REQUIREMENT WAS A COMPLICATED FORMALITY AND DISCARDED IT ALONG WITH MANY OTHER FORMALITIES IN THE OLD LAW. HOWEVER, IT WAS RETAINED FOR WORKS CREATED BEFORE THE EFFECTIVE DATE OF THE NEW LAW. AT THE TIME, CONGRESS WAS CONCERNED THAT GRANTING A SINGLE TERM OF PROTECTION TO THESE WORKS COULD IMPAIR EXISTING EXPECTANCIES OR CONTRACT INTERESTS, AND DRAFTING LANGUAGE THAT WOULD ADDRESS THIS CONCERN WOULD HAVE DELAYED PASSAGE OF THE REVISION BILL, A BILL THAT WAS MANY YEARS IN THE MAKING.

EXPERIENCE HAS SHOWN THAT THE RENEWAL REQUIREMENT FOR PRE-1978 WORKS HAS HAD LITTLE EFFECT OF ANY KIND ON EXISTING EXPECTANCIES AND CONTRACT INTERESTS. INSTEAD, THE COPYRIGHT OFFICE, BOOK AND MUSIC PUBLISHERS, AUTHORS, FILMMAKERS AND OTHER COPYRIGHT ORGANIZATIONS HAVE CRITICIZED THE REGISTRATION RENEWAL PROVISION FOR BEING BURDENSOME AND UNFAIR TO THOUSANDS OF COPYRIGHT HOLDERS AND THEIR HEIRS.

TO BE SURE, THERE IS SOME VALUE TO A REGISTRATION RENEWAL SYSTEM: IT PROVIDES A USEFUL PUBLIC RECORD FOR USERS OF COPYRIGHTED MATERIAL TO SURVEY SO THEY MAY LOCATE THE COPYRIGHT HOLDER AND ARRANGE TO LICENSE A WORK, OR DETERMINE WHEN COPYRIGHTED MATERIAL FALLS INTO THE PUBLIC DOMAIN. THAT IS WHY S. 756 OFFERS INCENTIVES TO AUTHORS, COMPOSERS, AND OTHER ARTISTS TO CONTINUE TO VOLUNTARILY RENEW THEIR COPYRIGHT IN A TIMELY MANNER, WHILE IT ELIMINATES THE HARSH CONSEQUENCES OF FAILING TO RENEW. REGISTRATION RENEWAL ENTITLES THE AUTHOR TO PRIMA FACIE EVIDENCE OF THE VALIDITY OF THE COPYRIGHT, AND GREATER CONTROL, IN THE RENEWAL TERM, OF THE USE OF DERIVATIVE WORKS WHICH THE COPYRIGHT HOLDER AUTHORIZED TO BE MADE IN THE FIRST TERM.

THE AUTOMATIC RENEWAL PROVISIONS WILL APPLY ONLY TO THOSE WORKS THAT ARE STILL IN THEIR FIRST, 28-YEAR TERM OF PROTECTION ON THE DATE THIS BILL BECOMES LAW. IF ENACTED THIS YEAR, THE BILL WILL PROTECT WORKS COPYRIGHTED BETWEEN 1963 AND DECEMBER 31, 1978. IT WILL NOT RESTORE PROTECTION TO WORKS THAT HAVE ALREADY FALLEN INTO THE PUBLIC DOMAIN, NOR WILL IT EXTEND THE TERM OF PROTECTION TO QUALIFYING WORKS BEYOND WHAT THEY ARE ALREADY ENTITLED TO RECEIVE.

CRITICS MAY ARGUE THAT THIS BILL WILL LIMIT THE PUBLIC'S ACCESS TO CREATIVE WORKS; THAT IT WILL DIMINISH THE PUBLIC DOMAIN. BUT THE PUBLIC DOMAIN SHOULD NOT BE ENLARGED BECAUSE OF AN AUTHOR'S ERROR IN RECORD-KEEPING, OR ANY OTHER INNOCENT FAILURE TO COMPLY WITH OVERLY TECHNICAL REQUIREMENTS OF THE COPYRIGHT LAW. ALL OF THE WORKS THAT ARE AFFECTED BY THIS BILL,

IN SOME WAY, ENRICH OUR CULTURE. THEIR CREATORS DO NOT WANT TO WITHHOLD THEM FROM THE PUBLIC. THEY SIMPLY WANT TO RETAIN RIGHTS ENJOYED BY AUTHORS OF MORE RECENT WORKS AND ENJOY THE FULL BENEFIT OF THEIR INVESTMENT OF TIME AND CREATIVE SKILLS.

THIS BILL HAS MET WITH VERY LITTLE OPPOSITION. THAT IS A TRIBUTE TO MR. RALPH OMAN, THE REGISTER OF COPYRIGHTS WHO IS APPEARING TODAY, TO HIS STAFF AND TO MANY OTHERS WHO HAVE PARTICIPATED IN DRAFTING THE BILL. THEY HAVE TAKEN GREAT CARE TO CRAFT LANGUAGE THAT ADDRESSES THE CONCERNS THAT CONGRESS FIRST VOICED DURING THE 1976 COPYRIGHT REVISION DEBATE. THEIR EFFORTS HAVE WON ENDORSEMENTS FROM WRITERS, FILMMAKERS, AND MOST OTHER MEMBERS OF THE AMERICAN CREATIVE COMMUNITY.

JOINING MR. OMAN AT TODAY'S HEARING IS MR. BURTON LANE, THE COMPOSER OF "ON A CLEAR DAY YOU CAN SEE FOREVER" AND OTHER POPULAR SONGS. MR. LANE WILL OFFER A COPYRIGHT HOLDER'S PERSPECTIVE ON THE LEGISLATION.

THE HEARING RECORD WILL REMAIN OPEN FOR 15 DAYS TO ACCOMODATE THE VIEWS OF OTHER INTERESTED GROUPS. WE WERE UNSUCCESSFUL IN LOCATING OPPONENTS OF THE BILL WHO COULD ATTEND TODAY'S HEARING, BUT THEY HAVE AGREED TO SUBMIT WRITTEN STATEMENTS. BARBARA RINGER, THE FORMER REGISTER OF COPYRIGHTS, WHO PLAYED A MAJOR ROLE IN DRAFTING THE 1976 GENERAL REVISION TO THE COPYRIGHT LAW, HAS ALSO AGREED TO FURNISH A WRITTEN STATEMENT.

102D CONGRESS
1ST SESSION

S. 756

To amend title 17, United States Code, the copyright renewal provisions, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 21 (legislative day, FEBRUARY 6), 1991

Mr. DECONCINI (for himself and Mr. HATCH) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend title 17, United States Code, the copyright renewal provisions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. COPYRIGHT RENEWAL PROVISIONS.

(a) DURATION OF COPYRIGHT: SUBSISTING COPYRIGHTS.—Section 304(a) of title 17, United States Code, is amended to read as follows:

"(a) COPYRIGHTS IN THEIR FIRST TERM ON JANUARY 1, 1978.—(1)(A) Consistent with the provisions of subparagraphs (B) and (C), any copyright, the first term

of which is subsisting on January 1, 1978, shall endure for 28 years from the date it was originally secured.

"(B) In the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of 47 years.

"(C) In the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his or her next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of 47 years.

"(2)(A) At the expiration of the original term of copyright in a work specified in paragraph (1)(A) of this subsection, the copyright shall endure for a renewed and

extended further term of 47 years which shall vest upon the beginning of such further term—

"(i) in the proprietor of the copyright if—

"(I) an application to register a claim to such further term shall have been made to the Copyright Office and registered within 1 year prior to the expiration of the original term of copyright; or

"(II) no such application is made and registered; and

"(ii) in the person or entity that was the proprietor of the copyright on the last day of the original term of copyright.

"(B) At the expiration of the original term of copyright in a work specified in paragraph (1)(C) of this subsection, the copyright shall endure for a renewed and extended further term of 47 years which shall vest, upon the beginning of such further term—

"(i) in any person entitled under paragraph (1)(C) to the renewal and extension of the copyright, if—

"(I) an application to register a claim to such further term shall have been made to the Copyright Office and registered within 1 year

prior to the expiration of the original term of copyright; or

"(II) no such application is made and registered; and

"(ii) in any person entitled under paragraph (1)(C), as of the last day of the original term of copyright, to such further term of 47 years.

"(3)(A) An application to register a claim to the renewed and extended term of copyright in a work may be made to the Copyright Office—

"(i) within 1 year prior to the expiration of the original term of copyright by any person entitled under paragraph (1) (B) or (C) to such further term of 47 years; and

"(ii) at any time during the renewed and extended term by any person in whom such further term vested, under paragraph (2) (A) or (B), or their successors or assigns, so long as the application is made in the name of the vested statutory claimants.

"(B) Such an application is not a condition of the renewal and extension of the copyright in a work for a further term of 47 years.

"(4)(A) If an application to register a claim to the renewed and extended term of copyright in a work is not

made and registered within 1 year before the expiration of the original term of copyright in a work, then a derivative work prepared under authority of a grant made prior to the expiration of the original term of copyright, may continue to be utilized under the terms of the grant during the renewed and extended term of copyright, but this privilege does not extend to the preparation during such renewed and extended term of other derivative works based upon the copyrighted work covered by such grant.

"(B) If an application to register a claim to the renewed and extended term of copyright in a work is made and registered within 1 year before its expiration, the certificate of such registration shall constitute prima facie evidence as to the validity of the copyright during its renewed and extended term and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration of a renewed and extended term of copyright made thereafter shall be within the discretion of the court.".

(b) LEGAL EFFECT OF RENEWAL OF COPYRIGHT IS UNCHANGED.—The renewal and extension of a copyright for a further term of 47 years as provided under sections 304(a) (1) and (2) of title 17, United States Code (as amended by subsection (a) of this section) shall have the same effect with respect to prior grants of a transfer or

license of the further term as did the renewal of a copyright prior to the effective date of this Act under the law then in effect.

(c) REGISTRATION PERMISSIVE.—Section 408(a) of title 17, United States Code, is amended to read as follows:

"(a) REGISTRATION PERMISSIVE.—At any time during the subsistence of the first term of copyright in any published or unpublished work in which the copyright was secured before January 1, 1978, and during the subsistence of any copyright secured on or after that date, the owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 409 and 708. Such registration is not a condition of copyright protection.".

(d) FALSE REPRESENTATION.—Section 506(e) of title 17, United States Code, is amended to read as follows:

"(e) FALSE REPRESENTATION.—Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409, or in the application for a renewal registration, or in any written statement filed in connection

with either application, shall be fined not more than $2,500.".

(e) COPYRIGHT OFFICE FEES.—Section 708(a)(2) of title 17, United States Code, is amended to read as follows:

"(2) on filing each application of registration of a claim to a renewal of a subsisting copyright under section 304(a), including the issuance of a certificate of registration if registration is made, $20.".

(f) EFFECTIVE DATE; COPYRIGHTS AFFECTED BY AMENDMENT.—(1) This section shall take effect upon the date of enactment.

(2) The provisions of this section shall apply only to those copyrights secured between January 1, 1963 and December 31, 1977. Copyrights secured prior to January 1, 1963 shall be governed by the provisions of section 304(a) in effect on the day prior to the effective date of this Act.

SEC. 2. REPEAL OF COPYRIGHT REPORT TO CONGRESS.

Section 108(i) of title 17, United States Code, is repealed.

STATEMENT OF RALPH OMAN, REGISTER OF COPYRIGHTS, LIBRARY OF CONGRESS, WASHINGTON, DC, ACCOMPANIED BY DOROTHY SCHRADER, GENERAL COUNSEL, U.S. COPYRIGHT OFFICE, AND ERIC SCHWARTZ, POLICY PLANNING ADVISOR TO THE REGISTER, U.S. COPYRIGHT OFFICE

Mr. OMAN. Thank you very much, Mr. Chairman. I'm grateful for the opportunity to testify on S. 756.

If I could begin by introducing my two colleagues at the table: Dorothy Schrader, the general counsel of the Copyright Office, and Eric Schwartz, policy planning advisor.

Your bill, Mr. Chairman, as you said in your opening statement, will alleviate some of the heartaches, hardships, and headaches that bedevil authors and their families.

During the 1960's and 1970's, Congress studied all aspects of a copyright law in the comprehensive revision effort. These efforts eventually culminated in the 1976 Copyright Act. During the revision process, the House and the Senate subcommittees criticized the copyright renewal requirement. Both the House report and Senate report pointed to the shortcomings of copyright renewal. Both reports described the renewal as "one of the worst features of the present copyright law."

So, Congress decided back in 1976 to eliminate the renewal requirements for all works created after 1978. But, Congress kept the renewal copyright registration system for works copyrighted before 1978. Counting back 28 years from that point, this required authors of all works copyrighted between 1949 and 1977 to file a renewal application with the Copyright Office during the 28th year or face loss of copyright protection.

Right now, we are renewing works created in 1963. Unless you amend the law, copyright owners will have to keep renewing their works until the year 2005. Many will continue to lose valuable copyrights until then because of negligence, inadvertence, or misunderstanding of the law.

Congress retained renewals for existing copyrights because many of the long-term contracts relied on the old system. Congress felt that it would be unfair and immensely confusing to cut off or change those future interests. No one at the time proposed the innovative solution that you have incorporated into S. 756. Your bill permits automatic vesting of the renewal interest without in any way disturbing the original statutory scheme for vesting the renewal in specified persons.

The renewal problems that Congress complained about in 1976 are still with us. It is a highly technical provision, and authors don't understand it. It creates uncertainty, and it makes everybody nervous. It really is, as you said, Mr. Chairman, a drop-dead provision. Once the work falls into the public domain, that's it. Nothing you can do can recapture it. Authors, their widows or widowers, and their children often rely on other people to manage their copyrights. They suffer greatly when, through negligence, confusion, or oversight, someone fails to renew. Most creative people hate petty paperwork, and renewals serve no useful purpose.

We have two standard form letters in the Copyright Office, Mr. Chairman. One of them related to renewal says that you have at-

tempted to renew your work too early, and I'm sorry, we have to return your file to you. The other most commonly used letter is the letter that says, I'm sorry you attempted to renew your work too late and your work has fallen into the public domain. It's this type of maddening bureaucratic requirement that drives creative people up the wall. Your bill would eliminate that.

Renewal also has an international dimension as well, Mr. Chairman. Many of our trade partners have complained about the current renewal system. They always waive this provision under our nose at copyright and trade negotiations. It puts our negotiators at a real disadvantage. Your bill would amend the Copyright Act to make renewal registration optional, but allow for automatic extension of the copyright for the second term, even if registration is not made.

The renewal copyright would vest in the person or persons entitled in the renewal under the statute on the last day of the first term. Earlier registration sometime during the 28th year by the proper statutory claimant would vest the renewal copyright and supercede the otherwise automatic vesting of rights on the last day of the first term.

The bill gives a few incentives that would encourage voluntary renewal registration, and it is my view, Mr. Chairman, that most authors would continue to use the renewal provision. The bill would create a legal presumption of copyright validity for registered works and it would clarify the rights and derivative works during the renewal term. If the renewal term vests automatically, but the author registers later, the courts would still give a legal presumption to the rights of the claimant.

The proposed statutory change would not impair contractual interests in existing expectancies. Rights in the renewal term would revert to the purchaser of contingent rights if the contingency comes to fruition by the last day of the first term of copyright.

One of the incentives to registration provides that derivative rights created in the first term can continue to be used in the second term without permission from the copyright owner, where no renewal registration has been made within 1 year before the expiration of the original term. But no new derivative works could be created in the second term without the permission of the copyright owner. This provision parallels the comparable rights under the termination provisions for post-1977 works, without overturning the 1990 decision of the Supreme Court in the *Abend* case. That case is left undisturbed by your bill.

Finally, Mr. Chairman, the bill provides for a fine up to $2,500 for any false representation in the application of copyright renewal registrations. This will help discourage false renewal claims. The proposed amendments apply only to those works copyrighted by publication with notice, or unpublished and registered with the Copyright Office between 1963 and 1977. Works that are in the public domain when the bill becomes law will remain in the public domain.

S. 756 is soundly drafted, and the Copyright Office favors its enactment. It is compassionate legislation. It's highly technical nature masks its human importance. Many authors and their

widows, widowers, and children will benefit if the legislation is enacted.

Thank you, Mr. Chairman. I would be prepared to answer any questions at the appropriate time.

[Mr. Oman submitted the following material:]

SUMMARY OF
STATEMENT OF RALPH OMAN
REGISTER OF COPYRIGHTS AND
ASSOCIATE LIBRARIAN OF CONGRESS

AUTOMATIC RENEWAL

Before the Subcommittee on
Patents, Copyrights and Trademarks
Senate Committee on the Judiciary

June 12, 1991

The Copyright Office supports S. 756, to amend title 17, the copyright renewal provisions. The bill will alleviate the hardships that the current renewal system causes many authors and their families.

During the revision process, Congress identified the shortcomings of copyright renewal, describing renewal as "one of the worst features of the present copyright law..." Congress decided in 1976 to eliminate the renewal requirements for all works created after 1978, and adopted a life plus fifty year term for most works, but retained the renewal copyright registration system for works copyrighted before 1978. This requires authors of works created between 1963 and 1977 to file a renewal application with the Copyright Office during the 28th year or face the absolute loss of protection.

However, the problems associated with renewals in 1976 still persist. It is a highly technical provision, it creates considerable uncertainty in the orderly exploitation of intellectual property, it is the subject of considerable litigation, and it causes authors, their widows or widowers and children to suffer greatly when, through negligence or omission, there is failure to secure timely renewal registration.

S. 756 would make renewal registration optional but allow for automatic extension of the copyright for the second term, even if registration is not made. It leaves unchanged the existing law's determinations about who has rights to renewal copyright. The bill establishes important incentives to encourage voluntary renewal registration, including a legal presumption of copyright validity for registered works, ordering of the rights in derivative works during the renewal term, and, if the renewal term vests automatically but registration is made later, evidentiary significance regarding the proper statutory claimant.

The proposed statutory change would not impair contractual interests in "expectancies" -- nor would it overturn the 1990 decision of the Supreme Court in Stewart, v. Abend. Finally, the bill has no retroactive effect.

STATEMENT OF RALPH OMAN
REGISTER OF COPYRIGHTS AND
ASSOCIATE LIBRARIAN OF CONGRESS

AUTOMATIC RENEWAL

Before the Subcommittee on
Patents, Copyrights and Trademarks
Senate Committee on the Judiciary

June 12, 1991

1

Mr. Chairman and members of the subcommittee, I am Ralph Oman, the Register of Copyrights. I thank you and your staff for this opportunity to testify today on S. 756, which would amend the copyright renewal provisions of the Copyright Act, title 17 of the United States Code. I think that the bill that you, Mr. Chairman, and Senator Hatch have introduced, will alleviate some of the unintended hardships that the current renewal system brings to many authors and their families.

Renewal copyright registration is now mandatory for works copyrighted before 1978. In passing the general copyright revision bill of 1976, Congress retained the two-term system of copyright duration for works already under copyright protection. For pre-1978 works, unless renewal registration is timely made in the Copyright Office before expiration of the first term of copyright (which is the end of the calendar year of the 28th year of protection), the work falls into the public domain. Copyright expires.

S. 756 would amend the Copyright Act to make renewal registration optional but allow for automatic extension of the copyright for the second term, even if registration is not made. The renewal copyright would vest in the person or persons entitled to the renewal under the statute on the last day of the first term. Earlier registration by the proper statutory claimant also would vest the renewal copyright and supersede the otherwise automatic vesting of rights on the last day of the first term. The bill establishes other incentives to encourage voluntary renewal registration, including a legal presumption

of copyright validity for registered works, ordering of the rights in derivative works during the renewal term, and, if the renewal term vests automatically but registration is made later, evidentiary significance regarding the proper statutory claimant.

Copyright Renewal: Background

The possibility of early termination of copyright protection if the author fails to make timely renewal registration with the Copyright Office is a harsh and inequitable feature of United States copyright law. This possibility exists for all works which secured federal copyright protection prior to January 1, 1978. Unless the law is amended, copyright owners must make renewal registration until the year 2005, or the copyright in their works will expire at the end of the calendar year of the 28th year of copyright.

Under the 1909 Copyright Act, the term of protection was twenty-eight years from first publication or registration, with the possibility of a second twenty-eight year term upon renewal in the last year of the first copyright term. Ownership of the right to renew was set under the terms of the copyright statute. Except for certain special categories (e.g. posthumous works, composite works, and works for hire), the author was designated as the initial owner of the renewal right or, if deceased, the beneficiaries named in the statute, generally the widower or widow and children taking in a class. The renewal right was

freely alienable, and, in practice, many authors were required to transfer their renewal interests in order to secure agreements to exploit their creations.

For a variety of reasons, problems have arisen regarding the functioning of the renewal provision. It is a highly technical provision which is difficult for even lawyers to understand. It creates considerable uncertainty in the orderly exploitation of intellectual property since it is inherently unclear who will possess the right of renewal until the renewal interest is vested by timely registration during the last year of the first copyright term. (Transferees who secure their renewal interest from the author take nothing if the author dies before copyright renewal can be registered.) The renewal provision has often been the subject of litigation as uncertainties have arisen over rights in highly valuable works. Authors, their widows or widowers, and children often rely on others to manage their copyrights, and they suffer greatly when, through negligence or omission, timely renewal registration is not secured.

During the 1960's and 1970's, Congress studied all aspects of the copyright law in the comprehensive revision effort; these efforts eventually culminated in the 1976 Copyright Act. The respective congressional subcommittees were highly critical of the existing copyright renewal system. The reports identified the shortcomings of copyright renewal in the following terms:

> One of the worst features of the present copyright law is the provision for renewal of copyright. A substantial burden and

> expense, this unclear and highly technical requirement results in incalculable amounts of unproductive work. In a number of cases it is the cause of inadvertent and unjust loss of copyright. Under a life-plus 50 system the renewal device would be inappropriate and unnecessary.[1]

The shortcomings of copyright renewal, coupled with other reasons, led Congress to abolish the system prospectively in the 1976 Copyright Act. In its place, Congress established the termination procedure. For works that secured federal copyright protection under the 1909 Copyright Act (protection secured prior to January 1, 1978), however, the old system generally remains in effect. Congress retained the old system for subsisting copyrights because contingent rights had been transferred for value, and it would have been unfair and immensely confusing to cut off or alter those interests.[2] No one at that time proposed the innovative solution now found in S. 756, which permits automatic vesting of the renewal interest without disturbing in any way the original statutory scheme for vesting the renewal in specified persons.

Support for the Renewal Proposal

This proposal was first brought to the attention of the Copyright Office by former Register of Copyrights Barbara Ringer,

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1 H.R. Rep. No. 1476, 94th Cong. 2d Sess. 134 (1976); Sen. Rep. No. 473, 94th Cong. 1st Sess. 117-118 (1975).

2 H.R. Rep. No. 1476, 94th Cong. 2d Sess. p. 139 (1976). It might also be unconstitutional, as a deprivation of property without due process.

Professor Jack Kernochan, and Irwin Karp. We are grateful to them for all of their work on the legislation.

In order to ascertain the level of support for modifying the renewal provision when the solution now included in S. 756 was first suggested, the Copyright Office sponsored an informal meeting of affected industry members. Twenty-five organizations, representing authors, copyright proprietors, publishers, guilds, educators, and librarians, were invited to attend. The meeting was attended by approximately half of the invited organizations.

All organizations taking a position on the renewal proposal supported its adoption. As might be expected, organizations most closely associated with authors were the most enthusiastic. The representative from BMI, for example, gave a moving account of past injustices whereby performance royalties from renowned musical compositions were lost to an impoverished widow as a result of failure to make renewal registration. Representatives from education and libraries reserved their positions pending discussions with their members, but they later indicated they did not oppose automatic renewal.

After the meeting, several more communications were received by the Copyright Office. With one exception, all were supportive of the proposal. That exception consisted of a telephone call from a person in the business of distributing public domain motion pictures. He asserted that there was little interest on the part of copyright owners in distributing independent motion pictures of the type typically falling into the public domain, and that he provides a valuable service to the

public by distributing public domain motion pictures.

Analysis of S. 756

S. 756 would amend the Copyright Act to provide for automatic renewal of all pre-1978 works in which copyright subsists, for an extended further term of 47 years.[3] The person or entity entitled to the copyright in the renewal term would continue to have the option of filing for renewal registration within the last year of the first term of copyright. In some instances registration would determine the person(s) entitled to the renewal term. For example, if an author dies in the last year of the first copyright term after making renewal registration, his or her death would have no effect on the ownership of copyright in the second term. Any person or company to whom the author had assigned the copyright would own the copyright for the second term. On the other hand, if the author dies without making timely renewal registration, the author's statutory beneficiaries get ownership of the copyright in the renewal term, and the person or company to whom the author had assigned the rights does not get ownership of the renewal copyright. Under the bill, if renewal registration is not timely made, the rights in the renewal term will vest automatically upon the beginning of the renewal term in the person or entity entitled by statute to claim the renewal term on the last day of the original term of copyright.

The proposed statutory change would not impair contractual

[3] Congressman Hughes and Congressman Moorhead introduced a companion bill in the House, H.R. 2372, Title II.

interests, in "expectancies." Rights in the renewal term would revert to the purchaser of contingent rights if the contingency comes to fruition by the last day of the first term of copyright.

The bill encourages filing for renewal registration with the Copyright Office within the last year of the first term of copyright. If such claim is filed and registered, the certificate of registration constitutes prima facie evidence of the validity of the copyright during its renewed and extended term and of the facts stated in the certificate. An application to register a claim to the renewal term may also be made at any time during the renewal term as long as the claim is made in the name(s) of the vested statutory claimant(s). The evidentiary weight to be accorded the certificate of registration of a renewed and extended term of copyright made after the expiration of the first term of copyright shall be within the discretion of the court.

Filing a renewal application is not a condition of the renewal of the copyright in a work for a further term of 47 years.

The bill also provides that derivative works created in the first term can continue to be used in the second term without permission from the copyright owner if no renewal registration has been made within one year before the expiration of the original term. No new derivative works, however, could be created in the second term without permission from the copyright owner. This provision creates a right to use the derivative work that parallels the comparable right under the termination provisions for post-1977 works without overturning the decision of the Supreme Court in Stewart, et al. v. Abend, 14 USPQ 2d 1614 (U.S. 1990).

Finally, the bill provides for fines of up to $2,500 for any false representation in the application of copyright renewal registrations.

The proposed amendments apply only to those works copyrighted by publication with notice, or unpublished and registered with the Copyright Office between 1963 and December 31, 1977. Works that are in the public domain when the bill becomes law will remain in the public domain.

S. 756 is soundly drafted and carries out the policy objectives noted by the Chairman in introducing the bill. The Copyright Office may suggest a few very technical improvements to the bill. For example, the bill contains one typographical error in section 1(a) -- page 2, line 23 should read "paragraph (1)(B)." Also, under section 1(b) ("Legal Effect of Renewal of Copyright is Unchanged"), the phrase "transfer or license of the further term" might better read "transfer or license of the copyright or other interest in the further term..."

Renewal Registration Statistics

The Copyright Office recently gathered statistics about the number of registration applications received in 1960-1962 and attempted a comparison with the number of renewal applications received for that group of registrations 28 years later. See Appendices 1-3. Under the 1909 Act a renewal application for a work published before January 1, 1978, the effective date of the 1976 Copyright Act, must be received during the 28th year of the first term of registration to extend

registration for an additional 28 year term.

Classes with consistently significant levels of renewals include books, periodicals, dramas, musical compositions and motion pictures. At the time of the general revision in the 1960's, the Copyright Office estimated that approximately 15 percent of all works eligible for renewal were renewed annually. Our recent comparison of eligible works versus actual works renewed reveals a similar pattern, although at a somewhat higher 20 percent average rate of renewal. Specifically, for 1960 works, the rate of renewal in 1988 is 20 percent; for 1961 works, the 1989 renewal rate is 17 percent; and for 1962 works, the 1990 renewal rate is 22 percent.

Some fluctuation may be seen in figures for the various classes in various years. This is due in part to the fact that processing of renewals and original applications are done within different time frames. Renewals are registered as of the date of receipt in the Office. The statistics regarding renewal registrations are derived, however, from records of renewals for which catalog entries have been made. The Cataloguing Division records reflect registrations made four to six months earlier. Thus, the annual figures for original term registration by subject matter cannot be matched exactly with the works for which renewal applications are logged in the 28th year of the first term of registration. However, by taking a three year sampling of registration numbers versus timely renewal numbers, the average figures run true to the proportion of works renewed as compared with the numbers of those works originally registered for copyright.

Not surprisingly, the statistics show higher average renewal rates for motion pictures and music. The rate of renewal for periodicals is higher than might have been expected. The most astounding statistics apparently show nearly 100 percent renewal of motion pictures in each of the three years analyzed. In fact, for two years, the rate exceeds 100 percent. In explanation of this finding, the Copyright Office notes that more than one renewal registration may be made for the same work of authorship.

The Copyright Office receives renewal applications that are known as "adverse claims" for many classes of works, particularly motion pictures. These are cases where more than one party claims copyright ownership of a work. Often the conflict concerns confusion about contractual agreements, licensing arrangements or inheritance rights. The Copyright Office does not make judgments in these matters, but rather accepts the applications for whatever legal value they may have.

Conclusions of the Copyright Office on S. 756

The Copyright Office has long had concerns about early termination of copyright protection due to technical errors and oversights. Congress apparently had similar sentiments when it eliminated copyright renewal for works securing copyright for the first time under the 1976 Copyright Act. However, due to the numerous contracts relating to contingent rights, Congress retained intact the renewal system of the 1909 Act.

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At the time the renewal issue was being considered in the copyright revision process, no proposal was put forth which would have maintained the essence of the renewal system, while, at the same time, would have addressed the injustice of forfeiture. Numerous other copyright issues occupied the time of the respective congressional subcommittees. S. 756 addresses an issue which probably should have been dealt with at the time of revision, but, due to the enormity of the revision task, was not. There appears to be virtually universal agreement that the renewal provision frequently causes injustices. To the knowledge of the Copyright Office, no organization has stated its opposition to automatic renewal. The Copyright Office finds the proposal to be meritorious, in the public interest, and worthy of your full support.

APPENDIX 1

COPYRIGHT REGISTRATIONS IN 1960 COMPARED WITH RENEWALS CATALOGUED IN 1988 [1]

FISCAL YEAR	ORIGINAL REGISTRATIONS		RENEWALS		PERCENTAGE
	Class	Number	Year	Number	
1960	A (books)	60,034	1988	9,128	15.2
1960	B (periodicals)	67,310	1988	10,037	14.9
1960	C (lectures)	835	1988	209	25.0
1960	D (dramas)	2,445	1988	428	7.5
1960	E (music)	65,576	1988	19,833	30.3
1960	F (maps)	1,812	1988	273	15.1
1960	G (work of art)	3 271	1988	307	5.8
1960	H (reprod. of work of art)	2,316	1988	232	9.2
1960	I (technical drawings)	768	1988	9	1.2
1960	J (photos)	842	1988	57	6.8
1960	K (commercial prints & labels)	11,485	1988	490	4.3
1960	L & M (motion pictures)	3,457	1988	3,586	103.7*
TOTAL		222,333		44,589	20.0(ave.)

[1] Figures for fiscal years 1960, 1961 and 1962 are taken from the Report of the Register of Copyrights, 1963, from the table "Registration by Subject Matter Classes for the Fiscal Years 1956-1960". Figures for fiscal years 1988, 1989 and 1990 are taken from the Copyright Office's automated database "COFIX".

* For further details about the statistical bases for Appendices 1-3, see text notes at p.8.

APPENDIX 2

COPYRIGHT REGISTRATIONS IN 1961 COMPARED WITH RENEWALS CATALOGUED IN 1989

FISCAL YEAR	ORIGINAL REGISTRATIONS		RENEWALS		PERCENTAGE
	Class	Number	Year	Number	
1961	A (books)	62,415	1989	7,197	11.5
1961	B (periodicals)	69,849	1989	8,499	12.2
1961	C (lectures)	1,029	1989	108	10.5
1961	D (dramas)	2,762	1989	361	13.1
1961	E (music)	65,500	1989	15,860	24.2
1961	F (maps)	2,010	1989	346	17.2
1961	G (work of art)	5,557	1989	394	7.1
1961	H (repro. of work of art)	3,255	1989	271	8.3
1961	I (technical drawings)	705	1989	4	0.6
1961	J (photos)	765	1989	6	0.8
1961	K (commercial prints & labels)	10,519	1989	722	6.9
1961	L & M (motion pictures)	4,654	1989	4,649	99.9*
TOTAL		228,820		38,417	16.8(ave.)

APPENDIX 3

COPYRIGHT REGISTRATIONS IN 1962 COMPARED WITH RENEWALS CATALOGUED IN 1990

FISCAL YEAR	ORIGINAL REGISTRATIONS		RENEWALS		PERCENTAGE
	Class	Number	Year	Number	
1962	A (books)	66,571	1990	9,967	15.0
1962	B (periodicals)	70,516	1990	9,995	14.2
1962	C (lectures)	875	1990	45	5.1
1962	D (dramas)	2,813	1990	491	17.5
1962	E (music)	67,612	1990	25,776	38.1
1962	F (maps)	2,073	1990	310	15.0
1962	G (work of art)	6,043	1990	569	9.4
1962	H (repro. of work of art)	3,726	1990	298	8.0
1962	I (technical drawings)	1,014	1990	0	0.0
1962	J (photos)	562	1990	28	5.0
1962	K (commercial prints & labels)	10,056	1990	522	5.2
1962	L & M (motion pictures)	3,641	1990	4,297	118.0*
TOTAL		235,502		52,298	22.2(avg.)

Additional Questions for Ralph Oman, Register of Copyrights on S. 756, Automatic Renewal

Question 1.

For most categories of works, the renewal rate is low. Do you attribute this low rate of renewal to the complexity of the law or do you think some people consciously relinquish their interest in the copyrighted work?

Answer:

Both factors come into play. The complexity of the law causes a portion of these works not to be renewed through the inadvertence of authors or their families. In other cases, the commercial value of the work has decreased to the point no one makes the effort to keep sufficient records to effect a timely renewal. Although the bill would give both categories 47 more years, the bill only protects a small class of works--those copyrighted between 1963-1978. And it is always possible for authors to decline to assert their rights if they wish, but they should have the choice.

Question 2.

If we automatically renew copyright protection in a work that is of little value to its author, won't this have a chilling effect on the use of works that were intentionally allowed to fall into the public domain?

Answer:

Most works of value are renewed today, so we will not keep many valuable works out of the public domain with this legislation. However, the current law results in authors inadvertently letting a few valuable works fall into the public domain. The bill is designed to protect authors from the inadvertent loss of copyright, and not allow a few commercial copiers to benefit from the inadvertent failure of the authors. Many older works (28 years old), such as textbooks, are not going to be of much value to educators or anyone else. Also, they can make fair use of these and other copyrighted materials. Finally, if the works are not of any value to the author, the likelihood is that they won't be of much use to users.

Question 3.

Last year, in a case involving the Alfred Hitchcock thriller "Rear Window," (Abend) the Supreme Court ruled on the issue of the transfer of rights in the renewal term and when those rights vest. Would this legislation have any affect on that ruling?

Answer:

No, as the Register makes clear in the Copyright Office's written statement, that decision would not be affected. The Abend decision held that those who receive rights in the renewal term from the author take only an expectancy in the renewal rights until the right is vested by registration in the last year of the original term. If the author dies before the right to renewal vests, the transferees receive nothing. In that case, the rights to renewal vest in the author's statutory successor--the widow, widower or children, etc.

The bill does however have a derivative rights exception--but this does not affect rights litigated in the Abend decision. The provision states

that failure to renew by registration means derivative works created in the first term can continue to be utilized under the terms of the license by the author even though another statutory claimant owns the copyright in the renewal term. However, the statutory claimant can continue to collect royalties in accordance with the provisions of the original grant of the derivative work rights.

Question 4.

Most of our trading partners have fewer formalities in their copyright laws than we do. I understand that our present registration renewal requirement is not imposed by most other nations. Do we insist that foreign authors of pre-1978 works comply with our renewal requirements in order to receive continued protection.

Answer:

Yes, and this has been a sore subject with some of our trading partners. It has been raised by the Mexican government and it has been the subject of discussion in some of our Eastern European trade agreement negotiations. Their authors are unaware of the renewal provisions and so they forfeit protection for their works by failing to make timely renewal registration.

Question 5.

Has this resulted in a refusal by other nations to extend reciprocal protection to works of U.S. origin?

Answer:

This has not happened to our knowledge, but it has made them less willing to consider providing retroactive protection unilaterally. For example, the Soviet Union does not provide protection for U.S. works before 1973. We did provide protection for their works provided they met our formalities requirements--notice and renewal etc.--and first published the work either in a Universal Copyright Convention country or, if the author were a U.S. domiciliary, in the United States. When pressed on the issue of retroactively protecting U.S. works before 1973, the Soviets say that the renewal provisions continue to deny their authors protection because most of their authors are unaware of the continuing need to make renewal registrations.

Question 6.

In 1988, Congress passed implementing legislation to enable the U.S. to participate in the Berne Copyright Convention. A major goal of the Berne Convention is to reduce formalities for securing copyright protection. Why wasn't the current registration renewal requirement modified to conform to the Berne Convention?

Answer:

Congress made the decision in the Berne Implementation Act of 1988 that it did not need to change the renewal requirements, and decided against doing so because "it would be unfair and immensely confusing to attempt to cut off renewal expectancies" (House Report language 1988).

Congress was aware that the Ad Hoc Committee in 1986 had concluded that the renewal provisions were inconsistent with the prohibition against

formalities with respect to foreign works. However, in 1988 no one proposed the innovative solution represented by S. 756, which legislates automatic renewal without disturbing the ownership of rights in the renewal term or interfering with the contractual agreements relating to renewal expectancies. Since Congress in the Copyright Act of 1976 had already eliminated the renewal system for post-1977 works, it decided to keep the renewal provisions and allow them to phase out by the year 2005.

The inequity of the current renewal system has been the subject of complaint by governments from countries engaged in bilateral discussions with the United States, including Mexico and the Soviet Union.

Senator DECONCINI. Mr. Oman, thank you very much.

Mr. Lane, we appreciate your being here. We welcome the great legacy of songwriting and experience in American musicals that you bring. You might tell me when you begin here how long you've been a member of ASCAP, so I can focus in on some questions relating to your involvement in that organization and the involvement of those who don't get renewals under the present situation. Thank you, sir.

STATEMENT OF BURTON LANE, COMPOSER, ON BEHALF OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS, ACCOMPANIED BY BERNARD KORMAN, GENERAL COUNSEL, AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS

Mr. LANE. Thank you, Mr. Chairman.

Senator DECONCINI. Mr. Korman, we are glad to have you here.

Mr. LANE. My name is Burton Lane. I am a composer and since 1933 a member of the American Society of Composers, Authors and Publishers (otherwise known as ASCAP). ASCAP's president, Morton Gould, is unable to be here today because of a prior commitment in Chicago. He asked me to pinch-hit for him, and I am honored and pleased to do so. I believe I am qualified by experience to speak for authors and composers for songwriters.

From 1957 to 1966, I served as president of the Songwriters Guild of America, then known as the American Guild of Authors and Composers. In 1971, I was elected to the Songwriters Hall of Fame. In April of 1985, I was elected to ASCAP's board of directors, where I continue to serve as a board member for my third consecutive term.

Composing music is my profession. I have written the music for six Broadway shows, of which the best known are "Finian's Rainbow," written with E.Y. (Yip) Harburg, and "On a Clear Day You Can See Forever," with Alan Jay Lerner. Among my better known compositions are "How are Things in Glocca Morra," "(I Like New York in June) How About You," and "On a Clear Day You Can See Forever." In the Broadway musical show, "On a Clear Day," Alan Lerner and I had a song we called, "What Did I have That I Don't Have." The title of that song might be considered appropriate for today's hearing, for what I had that I don't have now could very well be one of my own songs.

If I, or someone in charge of renewing my copyright in its 28th year, failed to renew, I could wake up one morning and discover

my song was no longer my song, but in the public domain. That would be quite a price to pay for ignorance or neglect.

I appear before you today on behalf of nearly 50,000 ASCAP members, including the estates of some great masters who are no longer with us—Irving Berlin, Leonard Bernstein, Aaron Copland, Duke Ellington, and George and Ira Gershwin, to name but a few. I also speak for more recent outstanding talents such as John Denver, Neil Diamond, Lionel Richie, Smokey Robinson, Diane Warren, and Stevie Wonder, again to name only a few. They have composed American music that has swept the world, music one hears virtually everywhere one travels. Of course, I also appear before you on behalf of many other American composers, songwriters, and authors whose names you may never have heard, but whose music is being played throughout the United States and all over the world.

As President Morton Gould wrote to you, Mr. Chairman, and to all of the members of the Senate and House Judiciary Committees, a number of important organizations in addition to ASCAP are on record as supporting your bill. They include: the Association of American Publishers; Broadcast Music Incorporated; the Authors League of America; the Dramatists Guild; the Motion Picture Association of America; the National Music Publishers Association; SESAC; and the Songwriters Guild.

And CISAC, the International Confederation of Authors' Societies is on record supporting the principle of automatic renewal. Foreign authors, of course, have no sympathy for technical requirements for protection of the author's right.

And so, in addition to ASCAP's members, I believe I speak for other composers and songwriters the world over and for others who create or own copyrights.

S. 756 is an intelligent and sorely needed amendment to our Copyright Law. ASCAP and those organizations I have just mentioned firmly support it for the following reasons.

First, the bill would avoid situations where significant and valuable works are lost forever, tossed into the public domain, purely due to the inexperience or neglect of the person charged with the duty of monitoring dates and complying with the renewal requirements.

With few exceptions, songwriters are not lawyers. We compose music and we create lyrics. We generally rely on the advice of professionals to promote our works and to guard our copyrights by complying with the law. Most of us are not aware of the complex and technical requirements of the Copyright Law and our widows and children often do not have the records or know-how to renew our copyrights after we are gone. That is why we pay for professional advice, advice that often costs a lot of money—more than many composers can afford. The large majority of authors are not successful and it is they who, for reasons of cost, entrust their copyrights and their livelihoods to individuals who may make errors due to inexperience, inadvertence, or simple neglect.

Under the current law, failure to renew a 1963 to 1977 copyright in the 28th year of protection causes the work to fall into the public domain forever. This result is draconian, especially when one recalls that most of the works affected by this requirement are

owned by lesser known authors and perhaps even more sadly, by their heirs whose livelihoods may be dependent on royalties. I believe, Mr. Chairman, you made this point in your previous statement.

In addition, there is this relatively new problem: in our increasingly complex and rapidly changing economic environment, smaller publishing companies are often being acquired by larger ones, and, in the process, compositions sometimes get lost in the shuffle and are overlooked through error. The irretrievable loss of their valuable compositions due to oversight or error is a severe and undeserved punishment for authors.

But on this point, I want to be very clear. Your bill will save the author or his or her survivors in the relatively rare cases where someone's foot slips. For that person, or his or her estate, the slip can be devastating. Of course, in the world of music generally, successful works are nearly always renewed and those works will continue to be renewed by registering claims.

Second, the bill would increase fairness among authors and among all works still in their first 28-year term of protection. It does away with the recordkeeping and monitoring aspects of renewing copyrights. It would extend the life of all first-term works uniformly, and that is fair.

Third, the bill enhances certainty regarding the life of all first-term works. This would eliminate the current cost of litigating over whether the technical renewal requirements needed to preserve an owner's rights were indeed met.

The bill also offers an important incentive to voluntary registration of renewal claims. Only if a renewal registration is filed would the claimant be entitled to renegotiate licenses for derivative works. In music, by far the most important derivative works are records and the right to make a new deal with a record company is an important right.

Thus, if one renews by filing a renewal claim, one has rights that are lost if instead the renewal is automatic. If a cheap record deal was made years ago, before the value of a song was known, that deal ends with the original copyright term if the renewal claim is registered instead of renewal being automatic. Under those circumstances, I feel confident that copyright renewal claims will continue to be registered.

I hope, Mr. Chairman, for all of us who created works in the years 1963 through 1977, that your bill is enacted so that instead of having to worry about "What Did I have That I Don't Have," authors and their survivors will know that what we have in the 28th year, we'll have in the 29th year—the 29th year after we created something of value that had not previously existed.

I thank you, Mr. Chairman, and your colleagues who are sponsoring this equitable remedy to an inequitable situation.

[The prepared statement of Mr. Lane follows:]

Statement of

American Society of Composers,
Authors and Publishers

by BURTON LANE

Mr. Chairman and members of the Subcommittee:

Good afternoon and thank you for giving me the opportunity to be heard on your proposed Copyright Renewal Bill, S. 756.

My name is Burton Lane. I am a composer and since 1933, a member of the American Society of Composers, Authors and Publishers (otherwise known as ASCAP). ASCAP's President, Morton Gould, is unable to be here today because of a prior commitment in Chicago. He asked me to pinch-hit for him, and I am honored and pleased to do so. I believe I am qualified by experience to speak for authors and composers, for songwriters.

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If I, or someone in charge of renewing my copyright in its 28th year, failed to renew, I could wake up one morning and discover my song was no longer my song, but in the public domain. That would be quite a price to pay for ignorance or neglect.

I appear before you today on behalf of nearly 50,000 ASCAP members, including the estates of some great masters who are no longer with us -- Irving Berlin, Leonard Bernstein, Aaron Copland, Duke Ellington and George and Ira Gershwin, to name but a few. I also speak for more recent outstanding talents such as John Denver, Neil Diamond, Lionel Richie, Smokey Robinson, Diane Warren and Stevie Wonder, again to name only a few. They have composed American music that has swept the world, music one hears virtually everywhere one travels. Of course, I also appear before you on behalf of many other American composers, songwriters and authors whose names you may never have heard, but whose music is being played throughout the United States and all over the world.

As President Morton Gould wrote to you, Mr. Chairman, and to all of the members of the Senate and House Judiciary Committees, a number of important organizations in addition to ASCAP are on record as supporting your bill. They include: the Association of American Publishers (AAP); Broadcast Music Incorporated (BMI); the Authors League of America; the Dramatists Guild; the Motion Picture Association of America (MPAA); the National Music Publishers Association (NMPA); SESAC; and the Songwriters Guild.

And CISAC, the International Confederation of Authors' Societies is on record supporting the principle of automatic renewal. Foreign authors, of course, have no sympathy for technical requirements for protection of the "droit d'auteur" -- the author's right.

And so, in addition to ASCAP's members, I believe I speak for other composers and songwriters the world over and for others who create or own copyrights.

S. 756 is an intelligent and sorely needed amendment to our Copyright Law. ASCAP and those organizations I have just mentioned firmly support it for the following reasons:

First, the bill would avoid situations where sig-

nificant and valuable works are lost forever, tossed into the public domain purely due to the inexperience or neglect of the person charged with the duty of monitoring dates and complying with the renewal requirements.

With few exceptions, songwriters are not lawyers. We compose music and we create lyrics. We generally rely on the advice of professionals to promote our works and to guard our copyrights by complying with the law. Most of us are not aware of the complex and technical requirements of the Copyright Law and our widows and children often do not have the records or know-how to renew our copyrights after we are gone. That is why we pay for professional advice, advice that often costs a lot of money -- more than many composers can afford. The large majority of authors are not successful and it is they who, for reasons of cost, entrust their copyrights and their livelihoods to individuals who may make errors due to inexperience, inadvertance, or simple neglect.

Under the current law, failure to renew a copyright in the 28th year of protection causes the work to fall into the public domain <u>forever</u>. This result is draconian, especially when one recalls that most of the works affected by this requirement are owned by lesser-known authors and perhaps even more sadly, by their heirs whose livelihoods may be dependent on royalties. Your proposed automatic renewal remedies this problem.

In addition, there is this relatively new problem: in our increasingly complex and rapidly changing economic environment, smaller publishing companies are often being acquired by larger ones, and, in the process, compositions sometimes get lost in the shuffle and are overlooked through error. The irretrievable loss of their valuable compositions due to oversight or error is a severe and undeserved punishment for authors.

But on this point, I want to be very clear: Your bill will save the author or his or her survivors in the relatively rare cases where someone's foot slips. For that person, or his

or her estate, the slip can be devastating. Of course, in the world of music generally, successful works are nearly always renewed and those works will continue to be renewed by registering claims.

Second, the bill would increase fairness among authors and among all works still in their first 28-year term of protection. It does away with the record-keeping and monitoring aspects of renewing copyrights. It would extend the life of all first-term works uniformly. And that is fair.

Third, the bill enhances certainty regarding the life of all first-term works. This would eliminate the current cost of litigating over whether the technical renewal requirements needed to preserve an owner's rights were indeed met.

The bill also offers an important incentive to voluntary registration of renewal claims. Only if a renewal registration is filed would the claimant be entitled to renegotiate licenses for derivative works. In music, by far the most important derivative works are records and the right to make a new deal with a record company is an important right.

Thus, if one renews by filing a renewal claim one has rights that are lost if instead the renewal is automatic. If a cheap record deal was made years ago, before the value of a song was known, that deal ends with the original copyright term if the renewal claim is registered instead of renewal being automatic. Under those circumstances, I feel confident that copyright renewal claims will continue to be registered.

I hope, Mr. Chairman, for all of us who created works in the years 1963 through 1977, that your bill is enacted so that instead of having to worry about "What Did I Have That I Don't Have", authors and their survivors will know that what we have in the 28th year we'll have in the 29th year -- the 29th year after we created something of value that had not previously existed.

I thank you, Mr. Chairman, and your colleagues who are sponsoring this equitable remedy to an inequitable situation.

Senator DECONCINI. Thank you, Mr. Lane. Let me just ask a few questions.

First, Mr. Oman, can you give the committee any idea of the percentage of work that loses copyright protection each year because of the failure of the authors or the agents to comply with the current renewal requirements?

Mr. OMAN. I think—Mr. Lane, would you like me to answer that?

Mr. LANE. Yes, go ahead.

Mr. OMAN. I can't speak from personal experience, but I will speak merely from the statistics of our office, which are only anecdotal. I'm sorry we don't have precise records on this point. There are a few high profile examples, like "It's a Wonderful Life" fell into the public domain inadvertently. But, by and large, authors don't make a public declaration upon their failure to renew, because they don't want to call people's attention to it, hoping that no one will notice that the copyright no longer exists. They continue to collect royalties unless someone challenges them on it.

Judging from the complexity of the renewal process, however, I suspect that there are many works that do fall into the public domain without actually putting a number on it.

Senator DECONCINI. Is there any way to determine how many expire at the end of 28 years that are not renewed?

Mr. OMAN. We have statistics on that, and it varies from one class of work to another. For instance, for motion pictures, 100 percent of the works are renewed, for those with obvious economic value. For other classes of works, in music, I think 30 percent of the works are renewed. It falls down to 1 to 2 percent for technical drawings and things like that.

Senator DECONCINI. I see. So, in music, 70 percent of works are not renewed?

Mr. OMAN. That's correct.

Senator DECONCINI. There is no way expcept to speculate as to why the renewal rate is so low for musical works. You don't know if it's the complexity of the statute, or as Mr. Lane says, songwriters just rely on somebody else to handle their renewals?

Mr. OMAN. I suspect most of those works have never enjoyed any commercial success, and people have lost interest in them.

Senator DECONCINI. Do you think this legislation will reduce the number of lawsuits on this issue; are there a number of lawsuits based on continued attempts to collect royalties and to enforce against infringement, or are you privy to that?

Mr. OMAN. We can only make an educated guess. There are a number of lawsuits that surround the whole renewal process. Whether or not this bill will solve any of the problems that give rise to these lawsuits is another matter. Very few people sue me for failing to renew their works because they failed to comply with some requirement. I'm not aware of any cases like that. Maybe Ms. Schrader would be aware of some.

But, by making the expectancies clear, and making it clear in the law, when works are protected, I think that will help eliminate the uncertainty and will eliminate lawsuits down the road.

Senator DECONCINI. Does this bill have any effect on unpublished works that were in existence before 1978?

Mr. OMAN. Well, in some ways it does, and it's a rather complicated answer. Let me ask Ms. Schrader to answer that question. It's too complicated.

Senator DECONCINI. Ms. Schrader, can you help us?

Ms. SCHRADER. Yes. Well, if the work was registered for copyright before 1978, then it's a statutory copyright and it would be subject to renewal. But if the work is unregistered——

Senator DECONCINI. If it's unpublished——

Ms. SCHRADER [continuing]. Unpublished, and unregistered. Some unpublished work could be registered.

Senator DECONCINI. I see.

Ms. SCHRADER. If it's unpublished and unregistered, then it's not affected by this bill. Congress had already set the term in its 1976 act.

Senator DECONCINI. Thank you.

Mr. Oman, do you know of anybody who opposes this ligislation?

Mr. OMAN. We had a meeting where we invited 25 individuals and organizations from around the country, trying to hit all the bases. We had the educators, the librarians, the proprietors, and the users of copyrighted works. Everyone is in favor of the bill—everyone who came to the meeting. Some are indifferent to it. But, we did not have anyone at the meeting who opposed it.

I did learn subsequently, however, that there was a company that distributes public domain motion pictures. They liked the idea of works falling into the public domain, and specifically, motion pictures. But, according to our statistics, the inadvertent loss of copyright for motion pictures has been eliminated as a problem. For the last 5 years, every motion picture has been renewed. So, I suspect that this company's future prospects for capturing works in the public domain is fairly limited and won't be materially affected by this bill.

Senator DECONCINI. Mr. Lane, have you had any bad personal experiences with the current registration renewal requirement involving any of your songs?

Mr. LANE. No, I haven't. I'm a member, of course, of the Songwriters Guild. They have an automatic way of notifying the members when their works come up for renewal.

Senator DECONCINI. Do you know if most songwriters, composers hire someone to help them with this process, or would you guess that most of them, except those that are very successful, just do it on their own?

Mr. LANE. I don't think that songwriters are capable of doing it on their own. There is no way for us to keep those kind of records. We rely on, and I know I rely on, the Songwriters Guild to inform me when it becomes due.

Senator DECONCINI. So you'd have to be a member of the Songwriters Guild to get that service or hire someone to do it?

Mr. LANE. That's a service that goes out to their members. That's correct.

Senator DECONCINI. And ASCAP does not provide any such service?

Mr. LANE. ASCAP does not notify us.

Senator DECONCINI. They don't give you any such service?

Mr. LANE. No.

Senator DECONCINI. Has that ever been discussed with ASCAP, having them expand their role to help?

Mr. LANE. I don't think that could be a part of ASCAP's activities. That would be a very special service that only the Songwriters Guild could give to its members.

Senator DECONCINI. Do you have any sense of the extent of this problem among composers or friends or acquaintances or business associates of yours? Is it a large problem, or is it somewhat isolated?

Mr. LANE. I know that it's a problem. I know from widows and children of decreased members that you are dealing with people here who have no knowledge of the music business whatsoever. They are far removed from it. They seek advice if they can afford it, and they pay for someone to help them.

Senator DECONCINI. You know firsthand of such examples? You don't have to give them to me.

Mr. LANE. No, I've only had discussions with people I know, and there is enough concern.

Senator DECONCINI. Do you have any feeling that it is widespread, or do you know?

Mr. LANE. I would imagine that it is widespread with writers. It's an extra burden on trying to maintain their interests.

Senator DECONCINI. Yes.

Does the Songwriters Guild just notify you that the time has come, or do they actually take the action for you?

Mr. LANE. Well, you have to pay the cost of renewal plus a small fee for that service.

Senator DECONCINI. But, they monitor it, and they know when it was first copyrighted?

Mr. LANE. I hope they do. I've been trusting them for a long time.

Senator DECONCINI. Then they contact you in the 28th year, saying that now is the time, here is what it is going to cost, and they fill out the papers for you. Is that how it works?

Mr. LANE. That's correct. That's how it works. My only experience with some writers, who are not as fortunate as some of the others, who are not as successful, is that it is a financial burden for them.

Senator DECONCINI. You mean because they have to join the guild?

Mr. LANE. No, because they have to pay for the renewal.

Senator DECONCINI. I see.

Mr. LANE. To do this with works that have not originally been very successful is a burden.

Senator DECONCINI Why don't most people join the guild, then, is that expensive?

Mr. LANE. No, it's not expensive. I don't know why they don't join. I think every songwriter in the country should join the Songwriters Guild.

Senator DECONCINI. Because it's inexpensive and it does give you that protection?

Mr. LANE. I should say it does; not only that kind of protection, but other protections, which are very important.

Senator DECONCINI. Mr. Lane, thank you, and Mr. Oman, thank you for your testimony this afternoon, it was very helpful. We appreciate it.

[Whereupon, at 3:45 p.m., the subcommittee adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL SUBMISSIONS FOR THE RECORD

STATEMENT OF BROADCAST MUSIC, INC.

IN SUPPORT OF S. 756

Before the Senate Judiciary Subcommittee on

Patents, Copyrights and Trademarks

June 27, 1991

Broadcast Music, Inc. (BMI) is the largest performing rights organization in the world. BMI represents over 120,000 writers, composers and publishers who have created more than 2 million copyrighted musical compositions.

Some of the songwriters and composers affiliated with BMI include Paul Simon, Michael Bolton, Billy Joel, Carole Bayer Sager, Michael Jackson, Willie Nelson, Gunther Schuller, William Schuman, Ellen Taffe Zwilich, John Kander, Fred Ebb, Charles Fox and Mike Post. On behalf of these and all the other creators of music whose works are licensed by BMI, BMI expresses its strong support for S. 756, which would make the applicable copyright renewal term automatic, and submits this statement for the record.

When the Copyright Act of 1976 was passed, thousands of works were in their first term of copyright. Rather than develop a method to integrate those transitional works into the new law, Congress retained the renewal registration requirement in Section 304(a) of that Act. By doing so, those works attained a contingent status different from anything created in America since 1978--if they are not renewed, they would fall into the public domain forever.

The very fact that the renewal system was eliminated for post-1977 creations is some indication that Congress was convinced that a single term of copyright was preferable to the method under prior law. Certainly, providing the benefits of copyright protection immediately upon creation and having them last for half a century beyond the creator's death emphasizes the fervor with which Congress sought to benefit copyrighted works. By doing so, Congress has given works created under the current law a significant special value not afforded to earlier creations--they are secure in their protection and the remuneration passed to their owners and creators and their heirs for a definite time, not subject to being divested because of a race against the clock. Without a doubt, the same concept that

envelopes these newer works in a blanket of copyright security entitles prior creations to like treatment. This bill would adjust the equities, so that no American copyright is treated differently simply because of its time of creation.

What is most ironic about the issue under consideration is the fact that in most foreign countries, where a single term of copyright for the life of the author plus fifty years after his death has long existed, a copyright which has fallen into the public domain in this country may still be protected. This bill will eliminate this domestic discrimination and allow the country of creation to protect a work for a length of time that fairly approximates the coverage given to copyrights elsewhere around the world. We will thus enhance our compliance with the Berne Convention, which prohibits formalities from affecting copyright protection.

Unlike most other creators of intellectual property, active writers and composers of music create hundreds of works in a lifetime. As a result, they have particular difficulty in renewing their copyrights. Many years ago they could rely on their publishers to keep track of renewal dates. Music publishing companies were small, family operations that were not overwhelmed by the number of copyrights that needed to be monitored. Of course, even in that era, if a publisher was essentially a one-man operation, renewal monitoring could become impossible, as Jacqueline Byrd's testimony on this bill indicated.

Today, on the other hand, music publishing companies are sold and re-sold, and the opposite effect occurs: a publishing conglomerate which has the works in its repertoire at renewal time typically no longer has a system to monitor renewal dates of the thousands of works it handles. Thus, the renewal registration requirement works against copyright owners in various contexts. The result is the same, however; if one misses the deadline, there is no second chance.

Many of the most popular songs in the BMI repertoire were first copyrighted between 1963 and 1977, the time period affected by this legislation. If S. 756 becomes law, works such as "Never My Love," "Bridge Over Troubled Water, "Goin' Out of My Head, "King of the Road", "Killing Me Softly With His Song, "Love Will Keep Us Together" "Tie A Yellow Ribbon Round the Old Oak Tree" and dozens of others of equal renown will continue to assure their creators of remuneration for their success, without the worry that it might all be lost due to an inadvertent oversight.

American music has always contributed greatly to the positive balance of trade that intellectual property generates for the United States. In dozens of countries around the world, songs created in this country have become popular in both English-language and translated versions. In light of such worldwide acceptance of these works, to deprive any number of their creators of just compensation because of an administrative error is indeed harsh.

This bill will still encourage the filing of renewal registrations by preventing the prima facie presumption of validity of the copyright from attaching without it, and by allowing derivative works to be used during the renewal term without permission unless a renewal is filed. However, if one forgets to renew, every right the Copyright Act gives the copyright owner will not be lost at the stroke of midnight of December 31st of the 28th year. For that reason alone, this bill deserves to become law.

Only those works now between 14 and 28 years old are involved and no works which have already fallen into the public domain will be revived. S.756, which has no significant opposition, will repair an anomaly in the Copyright Act. The House and Senate Judiciary Committees called that aberration the "worst feature" of the old law. This proposed amendment to the

Copyright Act will allow the fruits of the creators of American films, songs, plays and books created between 1963 and 1977 to be enjoyed without worry for as long as those which were created later, relieving an important body of intellectual property of an undeserving burden. Had the matter been fully analyzed at the time the Copyright Act of 1976 was enacted, it would likely have been addressed at that time. That oversight should be corrected now, before any more American copyrights suffer unjustly.

Respectfully submitted,

Frances W. Preston
President and Chief
Executive Officer
BROADCAST MUSIC, INC.
320 West 57th Street
New York, NY 10019

STATEMENT OF JACQUELINE BYRD,

WIDOW OF SONGWRITER ROBERT BYRD

HEARINGS ON H.R. 2372

AUTOMATIC RENEWAL

Before the House Judiciary Subcommittee

on Intellectual Property and Judicial Administration

June 20, 1991

Good morning, Mr. Chairman and members of the subcommittee.

I am Jacqueline Byrd. I very much wanted to come to Washington from California today to tell you what has happened to me and my family, and I thank you and your staff for the privilege of allowing me to speak to you.

The current legal requirement to file for renewal greatly affects people as much as copyrights. I know that nothing I can say will bring back the copyright that we have lost. But I sincerely hope that you will pass this bill to help all the other songwriters and their families whose songs still have to be renewed from ending up in the same kind of situation that has happened to us.

My late husband, who wrote songs under the name of Robert Byrd, and performed and made records as Bobby Day, wrote "Little Bitty Pretty One" in 1957. You may not recognize the title, but I'm sure you would know the song if you heard it, and I have a tape of it with me if you would like to hear it later. We had two children at the time, and we just moved into our first house. We didn't even have any furniture. One night Bobby just sat down on the floor in the corner and sang a song to me into his tape recorder. He told me that I was a "Little Bitty Pretty One," so that song was always special to me.

Bobby took his song to a small music publisher in Los Angeles for whom he had made a record the year before. The publisher liked the song and, as is the usual way of doing things in the music business, Bobby gave him the original and renewal copyright in return for a royalty contract. Both Bobby and

Thurston Harris recorded "Little Bitty Pretty One" and it became a hit. It has been played regularly on radio and television in this country and around the world ever since.

Bobby got royalties from BMI for many years on this and his other songs and we always counted on them. Although he wrote over 40 songs during his lifetime, only three were really successful and "Little Bitty Pretty One" was the most successful of all. It never brought us a fortune, but even a few thousand dollars a year was important to us with four children, one a daughter with cerebral palsy.

In 1982 the publisher that owned "Little Bitty Pretty One" died, and his widow, who was a woman over 80 years old, was left the business and all the songs her husband owned, including Bobby's. My husband didn't know anything about renewal registration, since he figured, as I'm sure many songwriters do, that the publisher would take care of whatever had to be done with the copyright he owned. But the publisher's widow either forgot or didn't know she had to renew "Little Bitty Pretty One" when the time came to do it.

One day last summer my husband got very sick, and we learned he had cancer. Around the same time Bobby got a letter from BMI which I opened. I couldn't believe what I was reading. The letter said that BMI found out from the Copyright Office that "Little Bitty Pretty One" wasn't renewed and so they had no choice but to stop paying Bobby his United States royalties. I was so shocked that I couldn't even tell my husband. I called the widow who owned the song and she said that she got the same

letter telling her that she had lost her share of U.S. royalties, too. All she could say to me was that she hoped that this whole horrible matter would somehow work itself out. I'm sure she now knows it won't. What is even more distressing for her is that she lost to another major song copyright that she not only owned but also had written because of the same failure to renew.

I never did have the heart to tell my husband what had happened. Bobby died last July, thinking that his royalties would help take care of his family for a long time. I am thankful that at least we will be receiving a little income from foreign countries where the copyright is still protected.

Had "Little Bitty Pretty One" been renewed on time, my family could have counted on income from it until the year 2032. That would have been a wonderful inheritance for Bobby's children and grandchildren. What makes our predicament all that more difficult to accept is that if my husband had written this song 21 years later than he did, none of this renewal paperwork would matter and we would automatically be receiving his royalties for 50 years.

However, because "Little Bitty Pretty One" was written when it was, it became instead part of a special unlucky class of songs which have a terrible penalty attached to them--renew them or lose them. In our case, apparently nobody was watching the time to renew. I don't believe you really meant to have so many popular song copyrights treated so differently simply because of when they were created.

With Bobby's money from performing gone and an ill daughter, now was when I could have used his song royalties the most. I won't be surprised to soon hear "Little Bitty Pretty One" on the radio, and in commercials and on new records, and my family and I won't have any part of the money that Bobby's creation will make for other people. It should have been many years before this song became public domain. If copyright protection was supposed to last long enough for a writer's family to benefit from his work after he dies, having somebody who doesn't know any better lose their song forever if they don't file a piece of paper at a certain time is a very severe punishment. Until "Little Bitty Pretty One" accidentally fell into the public domain, I always believed that the few successful songs that my husband had written would remain of value to me and my family. Instead, that expectation was lost on a legal technicality.

I hope you will remember my story of two widows caught up in a time trap that threw our copyrights away by mistake. You can help all the other songwriters and their families whose songs still have a chance to be saved. Please make this bill the law so that they can have the peace of mind to know that somebody's slip-up won't make a copyrighted song and its royalties disappear prematurely into the public domain.

Thank you.

SUMMARY OF
STATEMENT OF IRWIN KARP, ON BEHALF OF
THE COMMITTEE FOR LITERARY PROPERTY STUDIES
On S. 756: Copyright Renewal Provisions
June 21, 1991

S. 756 would amend Section 304(a) of the Copyright Act to provide for the automatic renewal of copyrights secured from 1963 to 1977, and to make registration of renewal applications voluntary rather than mandatory. The amendment would protect authors and their families against forfeiture of those copyrights upon failure to comply with the mandatory renewal requirements of Section 304(a). We urge that it be enacted.

In writing the 1976 Copyright Revision Act, Congress recognized that the renewal clause "is the cause of inadvertent and unjust loss of copyright." However, Congress retained the mandatory renewal requirement for pre-1978 copyrights still in their first term on January 1, 1978 solely to avoid impairing contingent rights (in future renewal copyrights) acquired under existing contracts.

The provisions of S. 756 would prevent forfeitures of copyrights secured between 1963 and 1977, without impairing any those contingent rights. If no application for renewal is filed within the prescribed one-year period, the renewal term would automatically vest in the statutory claimant entitled to it. Automatic renewal would have the same consequences that mandatory renewal now has. Thus, it would not impair contingent rights or overrule the REAR WINDOW or other renewal-clause decisions.

The present mandatory renewal requirement causes "inadvertent and unjust loss of copyright" because: many American authors, and their families, are unaware of the renewal requirement; foreign authors are more likely to be ignorant of the clause since their copyright laws do not require copyright renewal; authors often rely on agents or publishers to renew, and they may fail to do so; or errors in complying with the technical requirements of renewal may invalidate renewal applications.

Automatic renewal would not violate the public interest. Congress, in 1976, rejected the argument that the public interest was served by a renewal system because it caused many works to prematurely fall into the public domain. One of the reasons Congress adopted a life-plus-fifty year term was to prevent such forfeitures of copyrights secured after 1977. The House Report noted that renewal-clause forfeitures did not necessarily benefit the public, and even inhibited further dissemination of works.

Similarly, Congress apparently saw no conflict with the public's interest or the Constitutional purpose of copyright, when — in the 1976 Act — it increased the renewal term of all pre-1978 copyrights, including those already in their renewal term, from 28 to 47 years. This automatic extension keeps hundreds of thousands of copyrighted works out of the public domain for almost two decades beyond the point their protection otherwise would have expired.

STATEMENT OF IRWIN KARP, ON BEHALF OF
THE COMMITTEE FOR LITERARY PROPERTY STUDIES
On S. 756 (Sec.1): Copyright Renewal Provisions

THE SUBCOMMITTEE ON PATENTS, COPYRIGHTS
AND TRADEMARKS
SENATE COMMITTEE ON THE JUDICIARY
June 21, 1991

My name is Irwin Karp, and I submit this statement on behalf of the Committee for Literary Property Studies ("CLPS"), in support of the copyright renewal provisions of S. 756. CLPS is an informal group of authors, academics, literary agents and attorneys concerned with the protection of authors' rights. [Georges Borchardt, Robert F. Drinan, Frank D. Gilroy, Henry F. Graff, John Hersey, Justin Kaplan, Irwin Karp, John M. Kernochan, Perry H. Knowlton, Barbara Ringer, and Robert Wedgeworth.]

S. 756 would amend Section 304(a) of the Copyright Act to provide for the automatic renewal of copyrights secured from 1963 to 1977, and to make registration of renewal applications voluntary rather than mandatory. In November, 1989, our group proposed this revision in a memorandum and draft bill we submitted Chairman DeConcini, Mr. Kastenmeier (then Chairman of the House copyright Subcommittee), and the Register of Copyrights.

The Purpose and Effect of Automatic Renewal

The purpose of the amendment is to protect authors and their families against forfeiture of copyrights upon failure to comply with the mandatory renewal requirements of Section 304(a). Prevention of such forfeitures was one of the reasons that Congress, in the 1976 Copyright Revision Act, established a single life-plus 50 year copyright term in place of the two-term renewal system which governed the duration of pre-1978 copyrights. The Judiciary Committee noted that the renewal system was burdensome, unclear and highly technical -- and "[i]n a number of cases it is the cause of inadvertent and unjust loss of copyright." [S. Rept. 94-473, 94th Cong. 1st. Sess. 117-8 (1975)]

Congress, however, retained the mandatory renewal requirement for pre-1978 copyrights still in their first term on January 1, 1978 -- rather than extend the term to 75 years. As the Senate Report explained, this was done solely to avoid impairing contingent rights (in future renewal copyrights) acquired under existing contracts with authors and other possible renewal claimants. [p. 122]

The provisions of S. 756 would prevent forfeitures of copyrights secured between 1963 and 1977, without impairing any those contingent rights. If no application for renewal is filed within one year before the original term expired, the renewal term would automatically vest (on its first day) in the statutory claimant entitled to it on the last day of the first term. Automatic renewal would have the same consequences that mandatory renewal has under the present law.

Automatic renewal thus eliminates the sole concern which prompted Congress to retain the mandatory renewal requirement for copyrights still in their first term on January 1, 1978. Authors and their families would be protected against "inadvertent and unjust losses of" copyrights secured between 1963 and 1977. But no other substantive changes would be made in Section 304(a). Automatic renewal would vest the second term of copyright in the same persons entitled to secure it under the present section. And the Bill provides that automatic renewal of a copyright would have the same effect on prior grants of renewal-term rights as did mandatory renewal under the present section. Consequently, contingent rights under these prior grants would not be impaired, and the Supreme Court's interpretation of the renewal section in the REAR WINDOW case (Stewart v. Abend, 110 S.Ct. 759 (1990)) is not affected.

The amended renewal section provides for voluntary renewal registration, and establishes incentives for registration. These and other provisions, and their consequences, have been described and analysed in the clear and thorough statement submitted by the Register of Copyrights when he testified before the Subcommittee.

Copyright Forfeiture Under the Renewal System

These are some of the reasons why the present mandatory renewal requirement causes "inadvertent and unjust loss of copyright."

... Many American authors are unaware of the renewal requirement; and all the more so in the early years of their careers. Eugene O'Neill, for example, forfeited the copyrights in several of his earlier plays by failing to file renewal applications.

... Widows, widowers and children of deceased authors, ignorant of the renewal clause, fail to exercise their renewal rights.

... Foreign authors often lose U.S. copyrights since they are even less familiar with the renewal system; their copyright laws do not require copyright renewal.

... Authors, particularly those who create dozens or hundreds of works, inadvertently fail to renew or submit applications after the renewal period has expired. It requires careful record-keeping and monitoring to file a timely renewal registration 28 years after each copyright was secured. Many authors do not keep such records. When authors die before the renewal year, their surviving spouses and children, or other successor claimants, are at an even greater disadvantage.

... Authors often rely on literary agents or publishers to renew copyrights, and they can make the same mistakes. When authors change agents or publishers, or when publishers are acquired by larger firms, or go out of business, renewal applications may be overlooked.

The "unclear and highly technical requirements" of the renewal clause

also cause forfeitures of copyright.

... Failure to designate the proper renewal claimant in the application, filing of the form by an unauthorized person, and other errors may invalidate renewal applications.

... Novels, poetry, and other works first published in periodicals and later in book form are thrown into the public domain when the author only files a renewal application covering the later publication, and fails to file one for the copyright secured by the initial publication.

... Similarly, authors have forfeited copyrights in plays and other works initially registered in unpublished form and subsequently published — by only filing a renewal application covering the later publication, and not filing a timely application covering the earlier unpublished registration.

... Confusion as to the renewal period leads authors and other claimants to file applications too late to be effective.

Automatic Renewal and The Public Interest

Automatic renewal of pre-1978 copyrights would not violate the public policy underlying the Copyright Act. It has been argued that the mandatory renewal requirement serves the public interest because it does throw works into the public domain after only 28 years, and makes them available to the public.

Congress rejected that argument in writing the 1976 Act. It was urged to retain the renewal system for works copyrighted under the new Act, so that books, plays, musical compositions, etc. would continue to fall into the public domain after only 28 years through failure to file renewal applications. But Congress chose to replace the renewal system with a long, single copyright term, among other reasons, to prevent such forfeitures and to ensure that authors and their heirs would retain post-1977 copyrights for the full term of protection. (S. Rept. 94-473, 119)

It should be observed that other countries have not found it in their public interest to prematurely terminate copyrights through a renewal requirement. Under their laws, copyrights endure for a long, single term; works only fall into the public domain when that entire period of protection expires.

The Seante Report (p. 119) also noted that precluding inadvertent copyright forfeitures caused by the renewal clause would not prevent "using any work as source material" — i.e. employing the facts, information, and ideas it contains; or from making fair use of it. And the Report pointed out that these forfeitures do not necessarily benefit the public:

> "The public frequently pays the same for works in the public domain as it does for copyrighted works, and the only result is a commercial windfall to certain

> users at the author's expense. In some instances, the lack of copyright protection actually restrains dissemination of the work, since publishers and other users cannot risk investing in the work unless assured of exclusive rights." (p. 117)

Similarly, Congress apparently saw no conflict with the public's interest or the Constitutional purpose of copyright, when -- in the 1976 Act -- it increased the renewal term of all pre-1978 copyrights, including those already in their renewal term, from 28 to 47 years. This automatic extension keeps hundreds of thousands of copyrighted works out of the public domain for almost two decades beyond the point their protection otherwise would have expired.

The 19-year extension was not granted as an incentive to create new works; the books, plays, music and other works protected by it had already been created and copyrighted. The purpose was to assure their authors, and their families, a reasonable -- 75 year -- period of copyright protection, comparable to the life-and-fifty year term established for works created after the 1976 Act took effect.

The purpose of S. 756 is to assure authors of works copyrighted between 1963 and 1977, and their families, of protection during the last 47 years of that period, by eliminating the mandatory renewal requirement which frequently has caused the "inadvertent and unjust loss" of copyright when the first term expires.

Register of Copyrights Ralph Oman has stated that the Copyright Office finds the proposed revision of the renewal clause "to be meritorious and in the public interest." We heartily agree, and we urge that S. 756 be approved by the Subcommittee, and enacted by the Congress.

June 27, 1991

Senator Dennis DeConcini
Hart Office Bldg. 328
United States Senate
Washington, D.C. 20510-0302

Dear Senator DeConcini:

I am transmitting herewith, as requested, my views on the automatic renewal provisions of your bill, S.756, now being considered for enactment.

To identify myself for the record, I state here that I am Nash Professor Emeritus of Law, and Director of the Center for Law and the Arts at the Columbia University School of Law. I have taught courses and seminars on copyright and other aspects of intellectual property law for well over twenty years. In this letter I express my personal views and not those of organizations with which I am affiliated.

Let me begin my statement of views by saying that I am strongly in favor of the automatic renewal measure. Its adoption will eliminate one of the most distressing relics of the "old order" that still haunt our copyright law and still -- even after U.S. adherance to the Berne Convention -- threaten U.S. and foreign authors and copyright owners with loss of all rights for failure to comply with complex formalities.

Only one substantial reason was given for retaining, in §304(a) of the 1976 Copyright Act, the 1909 Act's two-term scheme (twenty-eight years plus forty-seven years renewal) for certain works -- i.e., those still in their first twenty-eight year copyright term as of January 1, 1978. That reason was a fear of disturbing valid renewal "expectancies" which were the subject of contracts. S. Rep. No. 94-473, 94th Cong., 1st Sess. 122(1975). S.756, which would effectively do away with renewal-based forfeitures over the remaining fifteen years of §304(a)'s applicability, demonstrates that this can be done without disturbing significant "expectancies". It would bring U.S. copyright law into closer harmony with the life-plus-fifty duration adopted in the 1976 Act, as well as with Berne Convention norms on duration and formalities.

S.756's provision for automatic renewal admirably advances the general purpose of U.S. copyright law. Our copyright system seeks, for the public's benefit, "to encourage people to devote themselves to intellectual and artistic creation" by granting them for a time the right to control and profit from their work. See Goldstein v. California, 412 U.S. 546, 555(1973). Under S.756, rights will no longer be prematurely lost at renewal time due to unintended non-compliance with unclear and highly technical requirements.

All of us who study copyright and have worked in copyright industries know of many important works whose owners lost all rights in them because of renewal failures. We know, too, that many more such cases go unreported by embarrassed publishers or other entrepreneurs. If its fate could have been foreseen, perhaps the sometime copyright owners of the film "Its A Wonderful Life" would have changed its title.

An important justification for the two-term system as found in the 1909 Act and as retained, in a limited way, in §304(a) of the 1976 Act, was to provide authors a "second chance". This meant a new opportunity to negotiate more favorable terms for exploitation of a work at a point where its economic value was probably better understood than when it was first marketed. In 1943, in Fisher v. Witmark, 318 U.S. 643, the U.S. Supreme Court ruled that an author who assigned his or her renewal expectancy to another was bound by the assignment if he or she survived until the time of vesting in the renewal year. At the same time, the Court noted that the author had an option not to dispose of this interest and so to preserve a "second chance". The "second chance" concept is still a part of the copyright law, embodied now in the termination provisions of §203.

S. Rep. No. 94-473, supra, at 108. It is, of course, wholly destroyed if all rights are lost due to a lapse in renewal formalities. Automatic renewal, putting an end to forfeitures, thus promotes a value integral to both old (1909) and new (1976) copyright laws.

If automatic renewal in S.756 furthers the general purpose of copyright, and serves a longstanding concern for authors' rights and opportunities, its enactment now seems virtually mandatory given the evolution in national copyright policy during the last fifty years or so, in the courts, in legislation and in international treaty engagements.

Well before the completion of copyright revision in 1976, U.S. courts showed increasing uneasiness, and even reluctance, with respect to formality-based divesting of rights, depriving authors of virtually all reward for their labors. See, e.g., American Visuals v. Holland, 239 F.2d 740 (2d Cir.1956), Public Affairs Associates, Inc. v. Rickover, 284 F.2d 262 (D.C. Cir.1960), vacated for inadequate record, 369 U.S. 111 (1962), King v. Mister Maestro, Inc., 224 F.Supp. 101 (S.D.N.Y. 1963), Goodis v. United Artists Television Inc., 425 F.2d 397 (2d Cir.1970), and Rosette v. Rainbo Record Mfg. Corp. 354, F. Supp. 1183 (S.D.N.Y. 1973).

The Copyright Revision Act of 1976 provided for a life-plus-fifty-years duration and, as noted earlier, a termination right. It did away with renewal and its attendant forfeitures, except for a transitional period. The accompanying Senate Committee report, S. Rep. No. 94-473 supra, at 116-119, is required reading here. It is eloquent about the problems of the renewal system. It describes that system as "one of the worst features" of the 1909 law, leading to "inadvertent and unjust loss of copyright". Concern over this kind of loss led also to changes aimed at reducing the likelihood of forfeitures for want of proper copyright notices. It was coming to be generally realized that the sanction of forfeiture is barbaric in impact and of a severity disproportionate to ends served.

As early as the 1950's, U.S. adherance to the Universal Copyright Convention signaled some slackening of U.S. devotion to formalities. Following the much greater loosening of 1976, just referred to, the U.S., in its Berne adherence legislation of 1988, has now largely (except as a transitional matter) renounced any conditioning of copyright validity on observance of formalities. In doing so, it has embraced the standard of Berne Article 5(2) which bars any such conditioning. If one considers, in addition, our adoption in 1976 of the life-plus-fifty term (prescribed also by Berne, see Article 7(1)), it is very clear that public policy, as embodied in the present law of the U.S. (to say nothing of the law of most of the developed nations of the world) and in our international engagements, strongly condemns today any unnecessary continuation of formality-based forfeitures of copyright in U.S. or foreign works. Automatic renewal per S.756 will put the U.S. in fuller compliance with national and international norms. It will do so without disturbing contractual obligations or other due process interests.

The Berne Convention, of which we are now members, provides a basis for other arguments favoring enactment of S.756. For example, the Ad Hoc Working Group on Berne Adherence -- see their Final Report at 10 Colum.-VLA Journal of Law & the Arts 513, 583 (1986) -- concluded that the seventy-five-year term given to properly renewed works under §304(a) was arguably too short to honor the implications of Berne durational rules. How much less adequate, then, is the mere twenty-eight-year term accorded in cases of non-compliance with make-or-break renewal rules. A good faith effort to honor the implications of Berne calls at least for assuring, as S.756 does, a seventy-five-year term, unimpaired by forfeitures.

The more we can eradicate formality-based forfeitures at home, the more we strengthen the U.S. position in negotiations with "Pacific Rim" or other countries whose commitment to higher copyright standards (via Berne or otherwise) we are now urgently seeking.

I have seen no significant argument against the automatic

renewal measure. The only opposing arguments that have come to my attention would turn the clock back and resurrect policies long disfavored by the courts and rejected both in domestic copyright legislation and in U.S. adherance to Berne.

The Register of Copyrights referred to one opposing argument in his article supporting automatic renewal, in B.M.I. Music World (Winter 1991), p.39. Works up for renewal "are already created", the argument runs, so that "no public benefit is served" by automatic renewal and continued protection. As to such works, copyright is said to have fulfilled its mission of encouraging creation. But this argumentation misconceives the purpose of copyright and does not respect the statutory design. If it were deemed a public benefit to end protection at twenty-eight years, authors would not have been given a renewal right in 1909 (and, transitionally, in 1976) or a life-plus-fifty term in the 1976 Act and in the Berne Convention. The S.756 renewal provisions are spare and narrowly drawn. They do not give the author new rights at public expense after twenty-eight years. They only take away -- in harmony with Berne -- the risk that the author will lose granted rights through inadvertence or ignorance. More importantly, the aims of copyright should not be fractionated, as this argument demands. Copyright's purpose is not merely to encourage an author to create a single work; it is rather, as said in the Goldstein case, quoted earlier, to spur authors to dedicate their careers to creative effort. Forfeiture of rights at renewal time may take away all of an author's profits from a successful work (perhaps representing years of labor) on which his or her livelihood depends. Such a work would otherwise have provided incentive and support for the development of derivative works drawn from the original, or for efforts to create new and different works. Note also that today's life-plus-fifty term was intended in part to protect authors not only against loss of copyright but also from having to compete against works of their own consigned to the public domain for want of apt renewal. S. Rep. No. 94-473, supra, at 117.

A related opposing argument, reported by the Register in the same article, urges that the public will benefit when a work falls into the public domain. Why, it is asked, should we make this less likely to happen -- as automatic renewal would do? This is an argument against copyright itself. The premise of copyright is that protection should be given to stimulate authors to create works because the public benefits from such creation. Only when the appropriate period of protection (now life-plus-fifty years) has expired do works enter the public domain. But during the period of copyright protection, protected works are not generally unavailable to the public. Protection commonly means that, before a work becomes entirely free to the public, its enjoyment by the public is subject for a time to certain rights of exploitation in the author, which rights are subject to limitation by "fair use" and other doctrines. The term of life-plus-fifty years given in the 1976 Act and in Berne is based on the assumption that authors, like other workers, need and want to earn a livelihood and provide for their families by their creative labors. Premature thrusting of works into the public domain takes away the incentives intended to promote this. It may, of course, be argued that automatic renewal across the board will protect works whose authors or owners would willingly have allowed protection to lapse at renewal time. It does not do this in greater degree than the life-plus-fifty term now firmly established in our law. Moreover, our already vast public domain need not be even temporarily deprived of works whose owners do not wish renewal. It is always open to a copyright owner to renounce copyright protection.

In sum, the case for automatic renewal under S.756, as it stands, seems to me overwhelming. I strongly urge its enactment.

With thanks for your attention, I am

Very truly yours,

John M. Kernochan
Nash Professor Emeritus
of Law

From: Gregory Luce
2747 Shannesy dr.
Medford, Oregon, 97504

7/15/91

To: Hon. Dennis DeConcini, Chairman
Subcommittee on Patents, Copyrights, and Trademarks
Hon. William Hughes, Chairman
Subcommittee on Intellectual Property

Re: Revision of the copyright renewal section

Dear Senator DeConcini,

In recent months I became aware of a bill that was being proposed by the Committee for Literary Property Studies that called for automatic copyright renewals on pre-1978 works. This letter is a plea to you and the members of Congress to reconsider the possible consequences of this bill if it's passed in its present form.

I'm not a member of any formal body or institution that opposes the bill, I'm simply a small businessman that runs a mail order video business, specializing in old mystery and science fiction films. I'm in contact with a significant number of film historians, archivists, businessmen, and other interested individuals who represent various institutions and businesses around the country that have also expressed concern over the effects of this proposed legislation. I've been encouraged by many of them to contact you. This letter is on behalf of many of them as well as myself.

In the bill recently introduced to Congress, present copyright laws would be changed to eliminate the need for mandatory copyright renewals on all works currently eligible for renewal through the year 2005. These works include all those copyrighted from 1963 through 1977. This committee, headed by Irwin Karp, cites heavy revenue losses on the part of thousands of authors, composers, motion picture companies, photographers, etc., because of their failure to file renewal registrations in the final year of the first term of copyright. Stating that current renewal requirements are "highly unclear and technical" this proposal would revise the law to allow 'voluntary' rather than 'mandatory' renewal registrations. For those works which renewals weren't received, registrations would be renewed *automatically* in the name of the original copyright claimant. In short, all pre-1978 works in their 28th year of copyright, would be renewed either voluntarily or automatically and would not be eligible for public domain status for an additional 47 years. In addition, all *unregistered* works, normally required to be registered before the end of the 28th year or fall into the public domain, would be allowed post-28th year protection, even if no registration is ever received during the first term.

This bill, in its present form, would have devastating results on the physical existence of thousands of motion pictures, causing future generations to be permanently deprived of these works. In addition, the bill would also eventually have negative economic effects on hundreds, perhaps thousands of owners and employees in the audio/visual media fields.

There is no argument between my associates and myself that the present renewal clause can sometimes cause premature and seemingly unfair loss of copyright protection for those who actually intend to renew, but for various reasons fail to do so within the proper time limit. Widows and heirs often forget to file because of their

ignorance of the law, while corporations are often the victims of careless employees and inadequate record keeping systems. Measures *should* be taken to insure easier methods for continued protection to those who want it.

There are however, thousands of works, particularly independantly made motion pictures, that have been completely abandoned by their original owners and would never be renewed under *any* circumstance. We'd like to make it clear that we're not concerned with pornographic material. Westerns, comedies, action pictures, mysteries, teenage oriented films, and sci-fi/horror films comprise much of what we're concerned about.

With the breakdown of the Hollywood studio system in the late 1950s, independant film making became more prolific than ever before. The cost of producing these films remained reasonably inexpensive up until the mid-1970s. There were probably more independant, non-major studio films produced between 1955 and 1975 than any other time period. Hundreds every year. A vast number of these pictures were produced by small companies that often ceased to exist shortly after their films were distributed. The copyright notices bore the names of countless companies that have long been out of business, but never bothered to legally disolve themselves. In many cases these companies were so small, and their artistic and economic intentions so short sighted that they never even bothered to legally establish themselves, either. Paperwork detailing ownership and various rights to specific individuals and their heirs has long since disappeared. In many cases these movies were financed by tax shelters. To try and track down the heirs to these properties would be a legal nightmare and more often than not an outright impossibility.

Sadly enough, the elements and negative materials to these films have fallen into misuse. Many were thrown out or destroyed by their owners or distributors within a few years of publication. It's often next to impossible to find decent 35mm or 16mm print material on many of these pictures after only 28 years, in fact, many are permanently lost already. However, if 'phantom' copyright renewals are placed on these works, giving them an additional 47 years of unwarranted protection, a vast number of them will be completely lost forever. Film decomposes, (safety film as well as nitrate) within a short span of years if it's not taken care of. Shrunken or warped prints, vinegar syndrome, color fading, arc burns,,, these are just a handful of things that can lead to the disintegration of film. There are already many interesting and unusual slices of Americana from the 60s and 70s will never be seen or heard again, and there will undoubtedly be countless more if this bill passes as presently written.

These abandoned films are the main staple of the public domain video industry. We feel we should have the continued right to make these properties available to the public. It might also be pointed out that the public themselves will be victimized. It's hard to imagine why anyone should have to wait until they're an old, old person before they can once again view a movie or TV show that they watched and enjoyed when they were young. It's the efforts of thousands of hardworking persons in the public domain field that make many of these programs available again. We don't want to steal that which isn't ours, or illegally pirate that which is still being used by its rightful owners. We simply want access to that which has been abandoned, and provide it once again to the American public. The rights of ownership are not unlimited when the work has already been made available to the public. If Ted Turner, who legally owns the rights to CITIZEN KANE and GONE WITH THE WIND, suddenly announced to the world that in 30 days time he was going to burn the negatives to those and other classic films, I dare say Congress might be considering passing a bill to stop him, rather than the one presently before them. *Public access should supercede the right of owner misuse.*

One might ask why an amendment requiring initial copyright registration is so important to the survival of films specifically from 1963-1978 and the answer is simple. Never in any other period of film history were independently made films so prolific. Unfortunately, never was ownership apathy so prolific as well.

In addition to film preservation, public access denial, and negative effects on the video industry, it appears that other areas might be affected, too. Unfortunately, my associates and I simply don't have the expertise in these areas to know for sure. However, it seems possible that education might be hurt. Many companies that produce low cost educational videos which utilize public domain technical and educational films in part or whole, might find their access to future materials extremely limited. Many valuable educational materials fall out of the domain of 'fair usage', and would be unusable. These effects might not be felt for several years. It could be that some of the potential victims of this bill might be schools, libraries, and students themselves. Sound recordings, (protected by underlying sheet music rights) might be affected, also. Not unlike film, master recording disks and tapes will decompose if not properly taken care of. Again, we can't say for sure that these effects would be felt, but it certainly seems worthy of very careful and thoroughly researched consideration.

The lack of organized resistance to this bill doesn't necessarily mean that it's without flaw, or that there aren't people who are opposed to it. Unfortunately, it may be that most people who would oppose it, simply don't know about it. It's true that the bill was publicized in certain magazines and journals. Mr. Karp was even heard on a national radio show. However, there are still countless, potentially affected people, (on both sides of the fence, surely) that are probably still ignorant to this legislation. Its overall presentation by its proponents has been disturbingly low key. We hope that Congress will take up the task of seriously and painstakingly examining the possible negative sides of this proposed bill, even though no organized opposition has been offered here-to-fore.

In its present form, this bill may hurt many more people than its proponents might think. However, it could easily be altered in a way that would still allow it to help the people that Mr. Karp and his committee are fighting for, but at the same time not have the devastating effects in other areas.

We feel an amendment should be added to this bill that would allow for the automatic renewals called for, *but only for registered works*. In other words, if a work wasn't registered for copyright at the time of publication, it must still be registered before the end of the 28th year to be eligible for *any kind of renewal*, automatic or otherwise. If a registration never comes in, the work should be allowed to fall into the public domain after the end of the 28th year. The bulk of works here-to-fore discribed as 'abandoned works' fall in to this category since the majority of them were never registered to begin with. Relatively few works of truly great importance are unregistered. Those that are, are almost always registered before the end of the 28th year. The removal of unregistered works from any kind of automatic renewal eligibility provided by this bill should be considered critical to the physical survival of countless motion pictures.

Unfortunately, this bill seems to put ownership above everything else, the rest be damned. There are people who might discribe those engaged in the public domain field as leeches and pirates who prey on properties not rightfully theirs. And while there are many 'public domainers' who bend the rules and often stoop to all out piracy, there are many more who are honest, hardworking people who continue to provide the public

with many things that they would never otherwise have access to. Whether or not our opponents are willing to admit it or not, public domain oriented companies act as preservationists. These companies and their employees have the right to a continued, fruitful existance in the future. But perhaps more importantly, the public should have the right to continued access to these abandoned slices of Americana.

A film is not like a book or a piece of sheet music that can be recopied and retypeset over and over again. Once the original elements are gone, there's no going back. It will *never* be seen or heard again. Should this bill be passed as currently written, there will be a large body of American culture that will literally sit and rot until it disintegrates. The end result? Possibly more lost films from the early 1960s through the mid 1970s than any other time period since the silent era. We can't let this happen.
Please consider the proposed amendment contained in this letter.

I spoke recently with Jeff Cooper who works with the Senate subcommittee on patents, copyrights, and trademarks. He informed me that public hearings on this bill had already been held in both houses of Congress, and that no opposition had come forth. My associates and I greatly urge you and your subcommittee to allow us some time to contact other institutions, businesses, and individuals who might wish to express their support for our viewpoints. We need time. Should you require further communication, We're at your service. I personally can come to Washington anytime after August 5th. Should you or any committee members or your staff wish to contact me directly, please call 1-503-773-6860, 9:30am to 5pm, pacific time.
Thank you for your time and attention.

Sincerely,

Greg Luce
President & Owner,
Sinister Cinema Video

CC: Jeff Cooper
Mike Remmington
Ralph Oman
Dorothy Schrader
Bernard Dietz
Eric Schwartz
Lewis Flacks

National Music Publishers' Association • Inc.

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S. 756
Statement of the National Music Publishers' Association, Inc.
Before the Subcommittee on Patents, Copyrights and Trademarks
Senate Judiciary Committee
102nd Congress, First Session
June 12, 1991

Mr. Chairman, the National Music Publishers' Association, Inc. (NMPA) is pleased to submit a statement supporting S. 756, the Copyright Renewal Act of 1991. We at NMPA are very appreciative of your efforts, Mr. Chairman, and those of Mr. Hatch in taking the lead in introducing this important legislation.

NMPA is a trade association representing more than four hundred music publishing companies, including virtually all of the most active and influential music copyright owners in the United States. The collaborations of our members and songwriters and composers have helped make the music industry in the United States one of the most economically and culturally successful in the world.

The Copyright Renewal Act of 1991 addresses a serious problem facing composers and holders of copyrights - the inadvertent lapsing of copyrights because of a failure to fully satisfy the 1909 Copyright Act's copyright renewal technicalities. Under the proposed Copyright Renewal Act, works copyrighted before 1978 will be automatically renewed at the end of the first twenty-eight year term of protection. Thus, copyrights available for renewal between 1991 and 2005 could not be unintentionally and tragically, forfeited. Works copyrighted after 1978 are not required to be renewed under the Copyright Act of 1976.

The entire intellectual property community would benefit from the enactment of the Copyright Renewal Act of 1991. There have been numerous cases of inadvertent lapses under the 1909 Copyright Act provisions. One

notable example of such a lapse by an unsuspecting owner is the case of the 1950's hit song "Rockin Robin." The widow of the songwriter of "Rockin Robin" was unaware of the technicalities of the 1909 copyright provisions, and therefore failed to fulfill her obligations under that act. She was divested of her ownership and financial interest in the song. Such an outcome benefits no one.

The 1991 Copyright Renewal Act encourages copyright owners, through incentives, to continue to formally renew copyrights of material from the pre-1978 period with the United States copyright office. NMPA, therefore, believes that no arguments exist against its enactment. Ralph Oman, the U.S. Copyright Register, supports "fast track" legislation action on this bill, a position which we firmly support.

The argument that the 1991 Copyright Renewal Act will prohibit works from being widely available is a false one. In fact, the diminished commercial value of dealing in public domain materials on a necessarily non-exclusive basis often discourages the manufacture and distribution of such works. Thus, consumers would have less access to works after their copyright protection expires. The movement of copyrighted materials into the public domain because of a failure to comply with renewal technicalities does not represent any real gain for consumers.

In conclusion, Mr. Chairman, in 1976 Congress acted to ensure copyright protection to all new works for a minimum of fifty years after the last surviving author's death. In 1988, Congress enacted the Berne Convention Implementation Act, confirming America's role as a leader of the world copyright community. There is insightful recognition in our country today of the importance of strong copyright protection to our economy, trade balance, and cultural legacy.

However, the continued existence of the 1909 copyright rules, and the resulting possibility that the ownership of works copyrighted before 1978 may be tragically and unfairly lost, is not consistent with the current intellectual property environment in the United States. The National Music Publishers' Association urges that Congress rectify this unfortunate anomaly in the Copyright Law before one more creator or copyright owner loses protection of his or her most valued asset for failure to comply with outdated and outmoded technicalities.

Thank you.

Statement of

L. Ray Patterson

on S. 756

SUBCOMMITTEE ON PATENTS,
COPYRIGHTS AND TRADEMARKS

of the

SENATE COMMITTEE OF THE JUDICIARY

July 23, 1991

I am L. Ray Patterson, Pope Brock Professor of Law, University of Georgia.

I have strong reservations about both the need for and desirability of S. 756, which would amend the copyright renewal provision of the Copyright Act, title 17 of the United States Code.

The questions I have are two: Is the amendment necessary? What public interest would the amendment serve?

As to the necessity of the amendment, it will benefit copyright owners whose copyright was in its first term on January 1, 1978, the date the 1976 Act became operative. There will continue to be copyright owners in this category until the year 2005, by which time all twenty-eight year terms in existence on January 1, 1978, will have expired.

The burden of renewal registration thus falls on a relatively few people for a relatively short period of time. Statistics of the Copyright Office show that the percentage of renewals is small. Since the burden of renewal is light, costing little in either time or money, the inference is that most copyright owners see no advantage in renewing their copyrights. The question that should be answered, then, is why provide a benefit for a class of persons, the larger number of whom neither desire nor need it.

Common sense tells us that the copyright of economically valuable works will be renewed, that these are relatively few, and that the beneficiaries of the proposed amendment will be relatively few. Moreover, the benefit will be relatively small in that it will relieve them of a minor administrative burden.

On the other hand, if the amendment becomes law, thousands of works that would otherwise be in the public domain remain in the thrall of copyright. While it is not likely that there will

be any great suffering as a result, there is here a fact that needs to be recognized.

The bill now under consideration is part of a pattern of ever greater protection for copyrighted works. The 1976 Copyright Act, for example, provides copyright protection for the life of the author plus fifty years, or for works-for-hire a term of 75 or 100 years; copyright now subsists from the moment an original work if fixed in a tangible medium of expression; copyright formalities have been substantially eliminated by the Berne Convention Implementation Act of 1988.

The pattern of ever-increasing protection of copyrighted works is contrary to the constitutional purpose of copyright--the promotion of learning. For Congress continually to enlarge copyright without good reason is a signal to the courts that they are free to treat copyright as merely a property right that is not vested with any public interest.

While copyright is a form of property, the subject of that property is information. This is why the Supreme Court--and indeed, Congress itself--has continually said that copyright is primarily to benefit the public interest, and only secondarily to benefit the author.

The test of any copyright bill should be whether it benefits the public interest. The present bill benefits a few private interests, but not the public interest. It provides continued copyright protection for works that would otherwise be in the public domain because the copyright owners do not prefer for them to remain under copyright. I do not see any justification--other than the self-interest of a few entrepreneurs--for utilizing the Congress of the United States to enact a law that will benefit the interest of so few at the expense of the interest of the many.

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June 27, 1991

Senator Dennis DeConcini
Chairman, Senate Subcommittee on Patents,
Copyrights, and Trademarks
Room 327 Hart Senate Office Building
Washington, D. C.

Dear Senator DeConcini:

As requested by your counsel, Geoff Cooper, I am pleased to enclose a written statement in support of S. 756, the bill for automatic renewal of certain subsisting copyrights. This is a thoroughly justified and badly need piece of legislation, and I am gratified that you and Senator Hatch are co-sponsoring it.

Sincerely,

Barbara Ringer

Barbara Ringer

STATEMENT OF BARBARA RINGER,
FORMER REGISTER OF COPYRIGHTS, ON
S. 756, THE BILL FOR
AUTOMATIC RENEWAL OF COPYRIGHT
June 27, 1991

I am a member of the Committee for Literary Property Studies ("CLPS"), and my views on the bill for automatic copyright renewal are fully reflected in the statement submitted to your Subcommittee by Mr. Irwin Karp, the Committee's counsel. In addition, however, I have a personal perspective on the problems addressed by this bill which I hope will prove of value to your members during further consideration of its provisions.

For five years (1951 - 1956) I was the Head of the Renewal and Assignment Section of the Copyright Office's Examining Division, and for some years thereafter, as Assistant Chief and Chief of that Division, I continued to have line authority over the Office's renewal operation. In the late 1950's I prepared an exhaustive study of the copyright law's renewal provisions, which was published in the early 1960's as a monograph in the Office's series of general revision studies. Beginning in 1955 and until my retirement in 1980 I was in close contact with the development, enactment, and implementation of what became the Act of October 19, 1976 for Geneeral Revision of the Copyright Law, and was directly involved in the drafting of the provisions on duration, renewal, and reversion. It should not be surprising that, after forty years of experience with this subject, I should have some strong feelings about it.

As I write this statement I have a mental image of my office in the old Copyright Office on the first floor of what is now the Adams Building of the Library of Congress, and of the constant procession of tragedies that were played out there. Some of these tragedies were revealed in correspondence: renewal applications received too late or inquiries (some from Congressional offices) about what to do now that the first term had expired. Worse were the frantic phone calls: if there was still any time left in the 28th year it was the Office's policy to move heaven and earth to get the renewal registered in time, but for claims received too late the pain we felt in conveying this message was nothing compared to the reaction on the other end of the line.

Worst of all were the personal visits from authors and their heirs whose property had been lost through no fault of their own. I have read the statement of Mrs. Jacqueline Byrd and was deeply moved by her experience, but I can only say that it is in no way untypical. When individual claimants break down in tears at what you have to tell them, it is not something that you can easily forget. Those of us who had to administer this unjust law, including Abraham L. Kaminstein (then Chief of the Examining Division), felt strongly enough to discuss the possibility of notifying claimants of the renewal deadlines applicable to their

works, but we had to conclude that the immensity, complexity, and expense of such an undertaking would make it wholly impracticable.

The reasons for a "too late" rejection varied: often there was simply no knowledge that such a requirement existed, or there was the all-too-common procrastination involved in undertaking to deal with government red tape. A great many authors or their heirs assumed that their original publishers or producers would take care of the matter, but during an era of corporate mergers, mass transfers of copyright ownership, and dazzling changes in the media and their control, compliance with a formality connected with a 28-year old work could easily get lost in the shuffle. Even where the original publisher or other original copyright owner had established a procedure for submitting timely renewal applications on behalf of their authors, there were frequent slip-ups: misfiled tickler cards, changes in personnel, mistakes and negligence of all kinds. As for potential renewal claimants from other countries, their total ignorance of the requirement was matched by their total amazement when it was explained to them.

None of this made sense to those of us who had to deal with renewal registration on a daily basis. Early in the revision program, when we were still talking about a copyright term based on the date of publication, there were some discussions of retaining renewal and providing grace periods, advance notices, or some kind of recourse against unjust forfeitures, but none of the suggestions seemed practicable or adequate. Based on a great deal of dismal experience it was ultimately the Office's conclusion that the renewal system was truly unjust to authors and their families, that any benefits it might have were not to the public but to potential pirates looking for a windfall, that a term of either 28 or 56 years was too short, and that, for the future, the whole renewal apparatus ought to be abandoned.

At the same time, it was considered important to retain the reversionary aspect of renewal. After a long wrangle, what emerged in the General Revision Act of 1976 was essentially a single term based on the life of the author, with a provision allowing the author or the author's family to reclaim copyright ownership after a period of time.

This left the question of what to do with subsisting copyrights still in their first term when the new law came into effect. The legislative history of the 1976 Act will bear me out in saying that this problem received very short shrift. Everyone agreed that the new law could not fairly, or even constitutionally, cut off future interests and expectancies that had been the subject of thousands of assignments, which in turn had been the subject of massive trafficking. The wording of the renewal provision had been interpreted in dozens of cases over more than sixty years, and no one dissented from the argument that, for subsisting copyrights in their first term, it would be dangerous to tinker with the old language, bad as it was.

The House Report strongly criticized the unfairness of the all-or-nothing renewal requirement, and recommended that it be repealed for the future. The same arguments applied to copyrights still in their first term, and it would have been far better if a way could have been sought at that time to ameliorate their situation. In the context of the general revision legislation there were raging arguments over the future length of the copyright term and the conditions for reversion of rights, but no one seemed disposed to focus on what was regarded as a transitional provision. No one, including me, had the imagination to suggest the rather simple solution contained in the bill now before you. There was certainly no understanding, tacit or otherwise, that the rigid renewal requirement had to be retained intact. The possibility of making renewal registration optional was, to the best of my recollection, never raised.

The 1976 statute did away with some copyright formalities and softened others, but retained certain requirements as a condition of securing and maintaining protection. The "transitional" renewal requirement for works in their first term on January 1, 1976 was one more formality, along with various notice, registration, and manufacturing provisions, and attracted no attention until the efforts to bring the United States into the Berne Convention began some ten years later. The Berne implementing legislation was highly controversial; and again there was apparently a disposition among its sponsors not to tinker with what might still be called a "transitional" provision. However, because the Berne implementing legislation finally did away with all formalities going to the life or death of a copyright except renewal registration, it now stands out like a blue carbuncle. Aside from producing human tragedies like those I have seen with my own eyes, it is fundamentally inconsistent with the basic provisions of our copyright law as it exists today.

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